IN THE SUPREME COURT OF THE UNITED STATES

October Term 1969

LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, AFL-CIO, its officers members and employees, and GEORGE GERMAN, individually and as President of LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, AFL-CIO, BRUCE BENNETT, LOUIS JOHNSON, WILLIE DAVIS, HANLEY and ZACHARIAS FAILEY

APPELLANTS

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, a body corporate and politic

APPELLEE

APPEAL FROM THE SPECIALLY DESIGNATED THREE-JUDGE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

JURISDICTIONAL STATEMENT

MORRISON & MORRISON
WM. M. G. MORRISON, JR.
Charleston, South Carolina
Attorneys for Appellants

WALKER, EVANS & COGSWELL CO.—Printers of Distinction Since 1921—CHARLESTON, S. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes involved	3
Questions presented	4
The questions are substantial	30
Conclusion	31
Appendix A	1a
Appendix B	4a
Appendix C	9a
Appendix D	21a
Appendix E	22a

TABLE OF CITATIONS

	Page
Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73	3, 13, 15, 18, 30
Capital Services v. NLRB, 347 U.S. 501	4, 11
James E. Youngdahl v. Rainfair, Inc. 355 U.S. 131	5, 18
NLRB v. Local 639 Teamsters, 362 U.S. 274	5
International Union U.S. Workers v. O'Brien, 339 U.S. 454	5
Hill v. Florida ex rel Watson, 325 U.S. 538	5, 10
Amalgamated Associations S. E. R. M. C. E. v. Wisconsin Employment Relations Board, 340 U.S. 383	5, 10
Amalgamated Meat Cutters, etc Local 427 v. Fairlawn Meats, Inc., 353 U.S. 20	6
Garner v. Teamsters Local 776, 345 U.S. 485	6
Guss v. Utah Labor Relations Board, 353 U.S. 1	7
San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26	7
San Diego Bldg. Trades Council Millmen's Local 2020 v. Garmon, 359 U.S. 36	7, 12
Hotel Emp. Union Local No. 255 v. Sax Enterprises, Inc., 35 U.S. 270	7
Plumbers, Steamfitters, Refrigeration, Petroleum Fitters and Apprentices of Local 298, A.F.L. v. County of Door, 359 U.S. 354	8, 12, 23, 31
Douds v. Seafarer's International Union of North America, 148 F. Supp. 953	8

TABLE OF CITATIONS (Continued)

	Page
N. L. R. B., Petitioner v. Local 313 of Electrical Workers, 254 F. 2d 221 F. 2d	8
Local Union 25, Teamsters, etc. v. N.Y., N.H. & H. RR Co., 350 U.S. 155	8, 9, 31
Weber v. Anheuser-Busch, Inc. 348 U.S. 468	9
State of Ohio v. Helvering, 292 U.S. 360	9
United States v. State of California, 297 U.S. 175	9
State of Georgia v. Evans, 316 U.S. 159	9
Local 429, Int. Bhd. of Electrical Workers v. Farnsworth and Chambers, 353 U.S. 969	10
Local 327, Teamsters v. Kerrigan Iron Works, Inc., 353 U.S. 968	10
General Drivers v. American Tobacco Co., 348 U.S. 978	10
Bogle v. Jakes Laundry Co., 362 U.S. 401	10, 12
United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62	10
LaCrosse Telephone Corp. v. Wisconsin Board, 336 U.S. 18	10
Bethlehem Steel v. New York Board, 330 U.S. 767	10
Grand Rapids City Coach Lines v. Howlett, 137 F. Supp. 667	11, 12
Pocahontas Terminal Corp. v. Portland Bldg. & Construction Trade Council, 93 F. Supp. 217	12
Direct Transit Lines v. Local 406 Int. Teamsters, 199 F. 2d 89	12

TABLE OF CITATIONS (Continued)

	Page
Douglas v. Int. Brotherhood of Electrical Workers, 136 F. Supp. 68	12
Overton v. Int. Brotherhood of Teamsters, 115 F. Supp. 764	13
Lambert Run Coal Co. v. Baltimore & Ohio RR Co. 258 U.S. 377	13
General Investment Co. v. Lake Shore & M. S. Ry Co. 260 U.S. 261	13
Verner v. Michigan Central RR Co. 271 U.S. 127	13
Minnesota v. United States, 305 U.S. 302	13
Freeman v. Bee Machine Co. 319 U.S. 448	13
Bell v. Waterfront Comm. of New York Harbor, 183 F. Supp. 175	17
DeVeau v. Braisted, 363 U.S. 144	17
Applegate v. Waterfront Comm. of New York Harbor, 184 F. Supp. 333	17
Stratton v. St. Louis Southwestern Railway Co., 282 U.S. 10	18
Ex Parte Metropolitan Water Co., 220 U.S. 539	18
Ex Parte Atlantic Coast RR Co., 279 U.S. 822	18
Ex Parte Northern Pacific Railway Company, 280 U.S. 142	18
Ex Parte Cogdell, 342 U.S. 163	18
Thornhill v. Alabama, 310 U.S. 88	18
Carlson v. California, 310 U.S. 106	18
Teamsters v. Hanke, 339 U.S. 470	18

TABLE OF CITATIONS (Continued)

	Page
N. L. R. B. v. Jones and Laughlin Steel Corp., 301 U.S. 1	19
S. S. v. Hill, 248 U.S. 420	19
Simpson v. Shepard, 230 U.S. 312	19
Southern Pacific v. Arizona, 325 U.S. 761	19
U. S. v. Wrightwood Dairy Co., 315 U.S. 110	19
Gibbons v. Ogden, 9 Wheat. 1	19
Pensacola Telegraph Co. v. Western Union Co., 96 U.S. 1	19
Chicago & NW Ry Co. v. Fuller, 17 Wall. 5	19
Southern Railway Co. v. U. S. 222 U.S. 20	19
Baltimore & Ohio Rwy v. Interstate Commerce Comm., 221 U.S. 612	19
Mondou v. N.Y. N.H. & H. RR Co., 223 U.S. 1	19
Texas & N.O. R. Co v. Brotherhood of R. & SS Clerks, 281 U.S. 540	19
Kelly v. Washington, 302 U.S. 1	19
Burns v. Dist. of Columbia, 91 U.S. 540	20
Iavine v. Greenwood, 72 S.E. 228	20
State of S. C. v. Columbia Railway Gas & Elec. Co., 124 S.E. 758	20
Hopkins v. Clemson Agricultural College of South Carolina, 221 U.S. 636	20
Clyde v. Richmond and D. R. Co., 57 F. 436	21
Fort Fetterman. 261 F. 2d 563	21

TABLE OF CITATIONS (Continued)

	Page
U. S. A. v. South Carolina, 199 U.S. 437	21
Bolen v. Board, 308 S.W. 2d 904	21
Arkansas State Highway Comm. v. Clayton, 292 S.W. 2d 77	21
Anderson v. City of Long Beach, 341 P. 2d 43	22
Abbott v. City of Los Angeles, 326 P. 2d 484	22
Kansas City v. Cain, 317 S.W. 2d 331	22
Sheldon v. Grand River Dam Authority 76 P. 2d 355	22
Kugler v. Tillotson, 300 S.W. 2d 517	22
Dahm v. Goodin, 295 S.W. 2d 600	22
Gray v. School Dist. No. 73 of Clay County, 20 S.W. 2d 657	22
Standard Oil Co. v. Nat. Surety Co. 107 So. 599	22
City of Miami v. Lewis, 104 So. 2d 70	22
Wolf v. City of Columbus, 129 N.E. 2d 309	23
State Highway Comm. v. Hudspeth, 297 S.W. 2d 510	23
Christensen v. State Highway Comm, 40 S.W. 2d 615	23
United States v. Grand River Dam Authority, U.S.	23
Griffen v. Scott, 27 S.E. 2d 570	28
Lawton v. New York Life Ins. Co. 186 S.E. 909	28
Mitchell v. Federal Intermediate Credit Bank of Columbia, 164 S.E. 136	28

TABLE OF CITATIONS (Continued)

	Page
STATUTES:	
28 U.S.C. 1253	3, 16, 30
28 U.S.C. 1337	3, 4, 11
28 U.S.C. 2281, 2283, 2284	3, 13, 31
29 U.S.C. 141, et seq.	3, 4, 5, 11, 10, 14, 21, 29, 30, 32
29 U.S.C. 157	3, 5, 10, 12
158 (b) (4)	5, 10
158 (b) (2)	5
158 (b) (7)	5
8 (a) (5)	5
152 (2)	8, 9, 15
160 (a)	6
15 U.S.C. 1-7, 15 note (Sherman Act)	10
Code of Laws of South Carolina, 1952, as Amended, Sections 54-1 through 54-171	2, 3, 14, 16, 17, 18, 19, 27
CONSTITUTION OF THE UNITED STATES:	
Article I, Sections 8, 9 and 10	3, 27
Article III	4, 27
Article IV	4, 27
Amendments I	4, 27
V	4, 27
IX	4, 27
XIII	4, 27
XIV	4, 27

MISCELLANEOUS:

McKinney Unconsol. Laws N. Y. 6700. et seq. 17, 25

Harvard Law Review, Vol. 74, No. 4, February, 1961, Pages 714, 720, 724, 725 ..... 24, 25, 26

4 S. C. Law Quarterly 433 28

Barron and Holtzoff, Federal Practice and Procedure, 487-488 28

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1960

LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, A.F.L.-C.I.O., its officers, members and employees, and GEORGE GERMAN, individually and as President of LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, A.F.L.-C.I.O., BRUCE BENNETT, LOUIS JOHNSON, WILLIE DAVIS, L. BAXLEY and ZACHARIAS FAILEY,

APPELLANTS

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, a body corporate and politic

APPELLEE

APPEAL FROM THE SPECIALLY DESIGNATED THREE-JUDGE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

JURISDICTIONAL STATEMENT

Opinions Below

The per curiam opinion, dated February 13, 1961, holding that the Three-Judge Court has no jurisdiction of this cause of action is to be reported in the Federal Supplement, the Order is in Appendix A, page 2(a).

Jurisdiction

This is an appeal from an Order of a specially constituted Three-Judge District Court. The South Carolina State Ports Authority brought an action against Local 1422 of the International Longshoremen's Association, A.F.L.-C.I.O., et al, in the Court of Common Pleas for Charleston County, on December 8, 1960, and at that time obtained an ex parte temporary injunction against the Appellants' picketing the facilities of the South Carolina State Ports Authority. Appellants removed this case to the United States District Court for the Eastern District of South Carolina on December 21, 1960, and after the cause was removed to this District Court, Appellants counterclaimed and answered the Complaint of Appellee, and asked, among other things, that the enabling acts of the Appellee, Sections 54-1 through 54-171 of the Code of Laws of South Carolina, 1952, as amended, be declared unconstitutional, and an injunction issued against the operation of these statutes, and Appellants also alleged that the operation of the South Carolina State Ports Authority was, in certain ways, unconstitutional. The Appellants further asked that Appellee's Complaint be dismissed and that the State Court injunction be vacated by the Three-Judge Court. Appellants further asked for summary judgment and for a declaratory judgment. Appellants base this argument on the fact that the Complaint itself alleged peaceful picketing, arising out of a labor dispute, and that this field of law has been absolutely preempted by the United States. It is further contended by Appellants that since the Complaint stated facts which, if true, constituted an unfair labor practice on the part of Appellants, then Appellee's exclusive remedy was not in the state courts but in the National Labor Relations Board, and it was the further contention of Appellants that the conduct which Appellee sought to enjoin in its Complaint was protected activity within

the meaning of 29 U.S.C. 157, and that Appellee's Complaint further showed that Appellee had refused to bargain with authorized representatives of the employees of Appellee.

The matter was heard before a Three-Judge United States District Court sitting at Charleston on February 10, 1961, and the Court held that no federal question existed, and remanded the case to the state courts of South Carolina. This is an appeal from the Order of the Three-Judge United States District Court.

The jurisdiction of the United States Supreme Court to review the judgment of the Three-Judge Court by direct appeal is conferred by 28 U.S.C, 1253, and is sustained by the case of *Florida Lime and Avocado Growers* v. *Jacobsen* (1960) 362 U.S. 73, 4 L. Ed. 2d 568, 80 S. Ct. 568. In this case, a complaint was dismissed by the three judge court, and the Supreme Court held that the action of a three judge court in dismissing the complaint was reviewable by the United States Supreme Court, and it is the contention of the Appellants that this case holds that when a three judge district court passes upon a question of the constitutionality of a state law that the action of the Court, whatever it may be, is reviewable by the United States Supreme Court.

Statutes & Constitutional Sections Involved

29 U.S.C. 141, et seq. (as amended)
28 U.S.C. 1337
28 U.S.C. 2281, 2283, 2284
28 U.S.C. 1253

Title 54-1 through 54-171 of the Code of Laws of South Carolina 1952 (as amended).

UNITED STATES CONSTITUTION
Article I, Sections 8, 9, 10

Article III
Article IV
Amendments I, V, IX, XIII, XIV

Questions Presented

(A) Whether or not the Three-Judge United States District Court erred in determining that the face of the Appellee's Complaint did not show a federal question when the facts stated in Appellee's Complaint, if true, constituted an unfair labor practice as defined in 29 U.S.C. 141, et seq.?

Appellee's Complaint is set out in Appendix B. In the Second Paragraph of the Complaint, Appellee shows that it is engaged in interstate and foreign commerce; in the Fourth and Seventh Paragraphs, Appellee shows that a labor dispute existed; in Paragraphs Third, Fifth and Sixth, Appellee alleges that it considers itself outside of federal regulation; and in the Seventh and Eighth Paragraphs of the said Complaint, Appellee shows that only peaceful picketing took place.

Title 28, Section 1337, of the United States Code states that the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

The United States Supreme Court, in the case of *Capital Services* v. *NLRB*, 347 U.S. 501, 74 S. Ct. 699, 98 L. Ed. 887, has held that the National Labor Relations Act (29 U.S.C. 141, et seq., as amended) is a law regulating commerce within the contemplation of statute giving district courts original jurisdiction of civil action or proceeding arising under Act of Congress regulating commerce.

The United States Supreme Court has held that a state

may not enjoin peaceful picketing in a labor dispute. *James E. Youngdahl* v. *Rainfair, Inc.* 355 U.S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151; *NLRB* v. *Local 639 Teamsters*, 362 U.S. 274, 4 L. Ed. 2d 710, 80 S. Ct. 706; *International Union U. A. Workers* v. *O'Brien* (1950) 339 U.S. 454, 94 L. Ed. 978, 70 S. Ct. 781; *Hill* v. *Florida ex rel Watson* (1945) 325 U.S. 538. A state may not enjoin peaceful strikes for economic objectives even when economic strike is undertaken against a local utility. *Amalgamated Association S. E. R. M. C. E.* v. *Wisconsin Employment Relations Board* (1952) 340 U.S. 383, 95 L. Ed. 364, 471 S. Ct. 359, 22 ALR 2d 874, 32 ALR 2d 1029.

The Appellee's Complaint shows that they have charged Appellants with concerted activity forbidden by Section 158 (b) (4) of the Labor Management Relations Act, and with a secondary boycott, another violation of Section 158 (b) (4). The allegations of the Complaint make it arguable that Appellee has charged Appellants with practices which, if true, constitute a violation of Section 158 (b) (2) and with violations of Section 158 (b) (7). In Paragraph Sixth, Appellee arguably admits that it has violated Section 8 (a) (5). These unfair labor practices can be seen by reference to Paragraphs Seventh, Eighth, Ninth and Tenth of Appellee's Complaint. In addition, the Affidavit which accompanied Appellee's Complaint bolsters the contention of the Appellants that the Appellee, in its Complaint, alleges facts that show that it is engaged in interstate and foreign commerce for profit. The Complaint further alleges peaceful picketing for economic objectives, protected conduct under Section 157.

Therefore, it is clear that the Appellee is engaged in interstate and foreign commerce, and that the Labor Management Relations Act, 29 U.S.C. 141. et seq., is an Act of Congress regulating commerce, which gives the United States District

Court original jurisdiction of any controversy concerning violations of this Act.

The Supreme Court has held that when an employer, even a governmental agency or a political subdivision of a state, alleges an unfair labor practice, the proper tribunal in which to determine whether or not an unfair labor practice did, in fact exist, is the National Labor Relations Board.

In order to show that this dispute is exclusively within the federal jurisdiction by the doctrine of preemption, we cite and rely upon the laws of Congress dealing with this subject, and specifically refer to the Labor Management Relations Act, more commonly known as the Taft-Hartley Act, wherein Section 160 (a) allows the states, if they so desire, to set up their own unfair labor practice agencies to deal with unfair labor practices within their jurisdictions, and the N. L. R. B. will cede to these state agencies the power to so deal only if the state agencies meet the N. L. R. B.'s standards. No such state agencies exist to our knowledge, and the decisions of the Supreme Court have shown that this part of the federal labor act shows that Congress has preempted the field, and we cite:

> *Amalgamated Meat Cutters, etc. Local 427* v. *Fairlawn Meats, Inc.*, 77 S. Ct. 604, 353 U. S. 20, 1 L. Ed. 2d 613, the portion of the statute empowering N. L. R. B. to cede its jurisdiction over unfair labor practices affecting commerce to a state agency operates to exclude state courts from disputes within N. L. R. B.'s jurisdiction in the absence of a cession agreement as well as operating to exclude state board from such disputes.

and to the same effect:

> *Garner* v. *Teamsters Local 776*, 74 S. Ct. 161, 345 U. S. 485, 98 L. Ed. 228;

and this is so regardless of whether the N. L. R. B. *declines jurisdiction or not, the states are powerless to act*, and we cite:

> *Guss* v. *Utah Labor Relations Board*, 77 S. Ct. 598, 353 U. S. 1, 1 L. Ed. 2d 601. The statute empowering N. L. R. B. to cede its jurisdiction over an unfair labor practice affecting Congress to a state agency, with certain exceptions is the exclusive means whereby states may be enabled to act concerning matters which Congress has entrusted to the N. L. R. B., and therefore Utah Labor Relations Board had no power to deal with unfair labor charges falling within the jurisdiction of N. L. R. B., where N. L. R. B. declined to exercise its jurisdiction but had not ceded jurisdiction to Utah Board.
>
> In view of the fact that the power of Congress in the area of commerce among the states is plenary, its judgment in regard to uniformity in application of labor relations matters entrusted to the N. L. R. B. must be respected whatever policy objections there might be to creation of a no-man's land in such field where jurisdiction is declined by National Board and not ceded to a state agency.

To the same effect:

> *San Diego Bldg. Trades Council* v. *Garmon*, 77 S. Ct. 607, 353 U. S. 26, 1 L. Ed. 2d 601, even though picketing was a tort under state law if picketing was *arguably* within sections of act relating to rights of employees or unfair labor practices. (Emphasis added).

and

> *San Diego Bldg. Trades Council Millmen's Local 2020* v. *Garmon* 79 S. Ct. 773, 359 U. S. 36, 3 L. Ed. 2d 775; and The Florida case, *Hotel Emp. Union Local No. 255*

v. *Sax Enterprises, Inc.* 79 S. Ct. 273, 35 U. S. 270, 3 L. Ed. 2d 289, where the Florida courts were without jurisdiction to enjoin picketing even though the N. L. R. B. declined jurisdiction.

In *Plumbers, Steamfitters, Refrigeration, Petroleum Fitters and Apprentices of Local 298, A.F.L.* v. *County of Door, A Municipal Corporation,* (May 4, 1959) 359 U. S. 354, 79 S. Ct. 844, 3 L. Ed. 2d 872, the United States Supreme Court has stated with respect to a County in Wisconsin seeking an injunction against the picketing of its Court House by a union:

> "Respondents attempt to distinguish the case by claiming that a political subdivision must be expressly included in a statute if it is to be considered within the law's coverage and that essential state functions will be impaired if the county is subjected to N. L. R. B. coverage. But this Court has many times held that government bodies not expressly included in a federal statute may nevertheless be subject to the law."

In addition, in *Douds* v. *Seafarer's International Union of North America,* (1957, D.C.N.Y.) 148 F. Supp. 953, it has been held that the Maritime Administration is an agency of the government and excluded from Section 152 (2), but that it does not lack employer status for the purpose of secondary boycott provisions and can go before the Board.

In the case of *NLRB, Petitioner* v. *Local 313 of Electrical Workers* (April 7, 1958) 254 F. 2d 221, in the Third Circuit, Judge Goodrich, following the "piggyback" case *(Local Union 25 Teamsters* v. *N.Y., N.H. & H. RR Co.* (1956) 350 U. S. 155, 100 L. Ed. 166, 76 S. Ct. 227), held that the New Castle County Airport Commission could go before the National Labor Relations Board.

The "piggyback" case, *Local Union 25 Teamsters, etc.* v. *N.Y., N.H. & H. RR Co.*, supra, held that railroads which are specifically excluded from the definition of employers under 29 U.S.C. 152, could not seek injunctive relief in the state courts, but having alleged that a union was guilty of unfair labor practices must resort to the National Labor Relations Board for determination of whether or not in fact the union had committed the unfair labor practices, and the National Labor Relations Board was the exclusive tribunal empowered by the Congress to determine whether or not unfair labor practices existed.

The case of *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481, 75 S. Ct. 480, 488, held that:

> "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by the Act, the state courts must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

The Supreme Court has held that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law. *State of Ohio* v. *Helvering*, 292 U.S. 360, 370, 371, 54 S. Ct. 725, 727, 78 L. Ed. 1307. A state is a "person" within meaning of a federal law taxing persons engaged in the sale of liquor. *United States* v. *State of California* 297 U.S. 175, 186, 56 S. Ct. 421, 425, 80 L. Ed. 567. A federal statute regulating common carrier by rail applies to a state. *State of Georgia* v. *Evans* 316 U.S. 159, 62 S. Ct. 972, 86 L. Ed. 1346. A state is a "person" within the meaning of the Sherman

Act 15 U.S.C.A., Sections 1-7, 15 note, and may seek relief under that statute.

State courts should not have the power to enjoin unfair labor practices or conduct permitted under the Labor Management Relations Act. *Local 429, Int. Bhd. of Electrical Workers* v. *Farnsworth and Chambers* (1957) 353 U.S. 969.

Paragraph Eighth of Appellee's Complaint shows that an "unlawful conspiracy" is charged against the Defendants. Therefore the Appellee has charged the Appellants with concerted activity violative of 29 U.S.C.A. 158 (b) (4).

The Supreme Court has held in *Local 327, Teamsters* v. *Kerrigan Iron Works, Inc.*, 353 U.S. 968, 77 S. Ct. 1055, 1 L. Ed. 2d 1133; *General Drivers* v. *American Tobacco Co.*, 348 U.S. 978, 75 S. Ct. 569, 99 L. Ed. 762, and *Boglé* v. *Jakes Foundry Co.* 362 U.S. 401, (decided April 18, 1960), that the state courts cannot enjoin this concerted activity.

We respectfully submit that a federal question existed in that the Appellee's Complaint stated facts which, if true constituted either an unfair labor practice under Title 29 U.S.C. 158, or was protected activity under Title 29 U.S.C. 157, and therefore the entire operation of Title 29 U.S.C. 141, et seq., should have operated to deprive state courts of jurisdiction, since federal rights were primarily involved. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75; *Bus Employees* v. *Wisconsin Board* (supra); *LaCrosse Telephone Corp.* v. *Wisconsin Board*, 336 U.S. 18, 24-26; *Bethlehem Steel* v. *New York Board*, 330 U.S. 767, 773-776; *Hill* v. *Florida ex rel Watson* (supra).

We respectfully conclude that the Three-Judge Court erred in remanding the Appellee's Complaint to the State courts of South Carolina on the ground that no substantial federal question existed on the face of the Appellee's Complaint.

(B) Whether or not the Three-Judge District Court erred in remanding the Appellee's Complaint when the Complaint showed that Appellee was engaged in interstate and foreign commerce, engaged in business, and that, under Title U.S.C. 1337, the United States District Courts have original jurisdiction of Acts of Congress regulating commerce such as Title 29 U.S.C. 141, et seq.?

(C) Whether or not the Three-Judge Court erred in remanding the Appellee's Complaint to the state courts of South Carolina when the face of the Complaint alleged facts which showed that this controversy was a controversy solely within the purview of the National Labor Relations Board?

Since Questions B and C are so closely related, we shall consider them as one.

The Appellee, in Paragraphs First, Second, Third, Fifth, Ninth and Tenth, considered together, unquestionably alleges that the Appellee is engaged in interstate and foreign commerce and therefore it necessarily regulates commerce and consequently regulates relations with its terminal employees.

Title 28, Section 1337, of the U. S. Code, states that the district courts "shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The United States Supreme Court in the case of *Capital Services* v. *N. L. R. B.* (supra), has held that Title 29 U.S.C. 141, et seq., is a law "regulating commerce" within the contemplation of statute giving district court original jurisdiction of civil action or proceeding arising under Act of Congress regulating commerce. This result was also reached in *Grand*

Rapids City Coach Lines v. *Howlett*, (DC Mich. 1955) 137 F. Supp. 667.

In this case, at the time of the hearing before the Three-Judge United States District Court, the Appellants had a motion to dismiss the Complaint pending, which was also heard with argument on the Motion for Remand. Therefore, the Three-Judge District Court in effect overruled Appellants' Motion to Dismiss, which motion was made on the ground that Appellee's Complaint did not state facts upon which relief could be granted. The Three-Judge United States District Court remanded the cause despite the fact that the *Door County* case (supra) and the *Bogle* case (supra) showed conclusively that the facts as presented in the Appellee's Complaint presented the questions of unfair labor practices under Title 29 U.S.C. 158, or protected activity under Title 29 U.S.C. 157. In both these instances the proper tribunal for the Appellee to resort to, if the Appellee desired injunctive relief, was the National Labor Relations Board.

This has been settled by *San Diego Bldg. Trades Council Millmen's Local 2020* v. *Garmon* (supra) where a state court injunction against picketing was vacated.

The motion to remand should have been denied. *Pocahontas Terminal Corporation* v. *Portland Bldg. & Construction Trade Council*, 93 F. Supp. 217; *Direct Transit Lines* v. *Local 406 Int. Teamsters*, 199 F. 2d 89; *Douglas* v. *Int. Brotherhood of Electrical Workers*, 136 F. Supp. 68; *Grand Rapids City Coach Lines* v. *Howlett* (supra).

If the proper tribunal was the National Labor Relations Board and not the state courts or the federal courts, then the action, together with the injunction is a nullity, and a nullity removed is still a nullity; therefore the motion to dismiss should have been granted and the injunction should have been

vacated, and we rely on the trenchant reasoning of the Court in *Overton* v. *Int. Brotherhood of Teamsters*, 115 F. Supp. 764.

The Three-Judge Court, before it could remand this case, must first have established that the case stated a cause of action upon which relief could be granted and that it was properly removed. *Lambert Run Coal Co.* v. *Baltimore & Ohio RR Co.* (1922) 258 U.S. 377, 66 L. Ed. 671, 42 S. Ct. 349; *General Investment Co.* v. *Lake Shore & M. S. Ry Co.* (1922) 260 U.S. 261, 67 L. Ed. 244, 43 S. Ct. 106; *Verner* v. *Michigan Central RR Co.* (1926) 271 U.S. 127, 70 L. Ed. 868, 46 S. Ct. 444; *Minnesota* v. *United States* (1939) 305 U.S. 302, 83 L. Ed. 235, 59 S. Ct. 292; *Freeman* v. *Bee Machine Co.* (1943) 319 U.S. 448, 87 L. Ed. 1509, 63 S. Ct. 1146.

Oral argument at the hearing and the Appellants' brief on the jurisdiction question show that the pending motion to dismiss was argued. The Three-Judge District Court had to overrule the Appellants' motion to dismiss before it could remand the cause.

We respectfully submit that the orders of a three-judge district court, convened for the purpose of hearing argument on the constitutionality of state statutes under Title 28 U.S.C. 2284, are reviewable by direct appeal to the United States Supreme Court under Title 28 U.S.C. 1253, whether non-constitutional grounds of attack are also alleged, and that having jurisdiction, the Supreme Court may determine all issues therein. *Florida Lime and Avocado Growers* v. *Jacobsen*, supra.

Therefore, we respectfully submit that the Three-Judge United States District Court erred in overruling Appellants' motion to dismiss and in remanding the cause to the state courts of South Carolina when the face of the Plaintiff-Appellee's Complaint showed that the Plaintiff-Appellee was en-

gaged in interstate and foreign commerce, and that a labor dispute with peaceful picketing was present, and therefore the case fell within the purview of the National Labor Relations Board under Title 29 U.S.C. 141, et seq.

(D) Whether or not the Three-Judge District Court erred in not considering the question of the constitutionality of Sections 54-1 through 54-171 of the Code of Laws of South Carolina, 1952, as Amended?

In the Appellee's Complaint, Appellee alleges the operation of the enabling acts of the South Carolina State Ports Authority, which Acts are Sections 54-1 through 54-171 of the Code of Laws of South Carolina, 1952, as amended, Appendix E. These Acts show that:

(1) The Complaint shows that the Plaintiff is an *instrumentality* of the State of South Carolina. Section 54-13 (1) (Emphasis added)

(2) That it is "engaged in *interstate and foreign commerce*" . . . "to do and perform any act or function which may tend or be useful . . . to the increase of *water-borne commerce, foreign* and *domestic*, through such harbors and seaports." Section 54-13 (9) (Emphasis added).

(3) That it regulates interstate commerce and revokes and issues licenses of persons who engage in interstate commerce. Section 54-14 and particularly (14) thereof.

(4) That it may acquire property (Section 54-15); operate and control any motive power or conveyance (Section 54-16); may issue bonds (Section 54-16); exchange property (Section 54-17); supervise wharves and warehouses and their erection and repair (Sections 54-31 through 54-54); exercise control over the harbor and bays

of Charleston (Section 54-123); levy fees and port charges (Sections 54-126 and 54-127); regulate compensation of vessels using the harbor and bays of Charleston (Section 54-124) and hire and fix pay of workmen (Section 54-14 (5)).

The Affidavit forming part of the Complaint also admits that the Appelle is engaged in business in interstate and foreign commerce, and that it handles and warehouses cargoes and loads ships and services ships, all for profit.

Thus, the Appellee admits that it is engaged actively, for profit, in interstate and in foreign commerce. The Appellee then cites 29 U.S.C. 152, and states that it is exempt from this Act as a political subdivision of the State, even though it is admittedly engaged in interstate and foreign commerce.

In addition, as is alleged in Appellee's Complaint in Paragraphs Third and Fifth, Appellee is empowered to appoint, employ and dismiss at *pleasure* such employees as may be selected by the board, and to fix and pay the compensation thereof. (emphasis added)

Under the rationale of the *Jacobsen* case, supra, the Three-Judge District Court should have heard argument on the constitutionality of the statutes of South Carolina, supra.

It is clear that constitutional questions were presented by the Appellee's Complaint. The allegations of the Complaint admit that the Appellee is engaged in interstate and foreign commerce, and being so engaged, Appellee is regulating commerce and its relations with its employees who are also engaged in interstate and foreign commerce. Paragraphs First, Second and Third, and the Affidavit attached to the Complaint, conclusively show this. It can be seen that Appellee is engaged in the loading and unloading of ships in Charleston, South Carolina, and in the servicing of ships here. It

can also be seen that Appellee is engaged in the operation of a business by collecting dockage fees, wharfage fees, cooperage fees, and fees for the handling and warehousing of cargoes, and as such, Appellee makes direct charges on interstate and foreign commerce. A perusal of the enabling acts, particularly Sections 54-14, (2) through (9), (11) and (12), (14) Sections 54-15 and 54-16, 54-18 and 54-19, 54-20, 54-31, 54-33 and 54-34, 54-35, 54-51 through 54-53, 54-61 through 54-63, 54-116 and Sections 54-123 through 54-128, indicate that the South Carolina State Ports Authority is an instrumentality of the state, but it is also a business enterprise. It can issue licenses, according to its own arbitrary standards. It can levy charges and fees as in its discretion may be necessary, under Section 54-126. It can make contracts with employees and hire and fire them and fix their compensation at its pleasure, Section 54-14 (5). It may control the erection and use of wharves and may order the removal of wharves, Section 54-51; appoint or elect harbor masters and port wardens, 54-125. It may use state property, Section 54-17. It may lease and rent property, it may solicit business for the Port of Charleston in direct competition with private enterprise, and it is exempt from taxation, Section 54-64.

In short, the South Carolina State Ports Authority is operating a business in competition with other businesses, while at the same time controlling these other businesses, and while the South Carolina State Ports Authority is so engaged in business, it enjoys what it claims to be governmental immunity. It pays no taxes; it uses state lands; it claims to be free from the duty to bargain collectively, and to be free from allowing its employees to organize. Yet on the other hand, it can borrow money, acquire land, and arbitrarily set up standards and regulations by which all who use the Port of Charleston must abide. Its control far overreaches the control of only

the docks and warehouses that exist in the Port of Charleston. It, in fact, controls the Port of Charleston in matters unrelated to the operation of its docks, warehouses and facilities, Sections 54-12, 54-31, and Sections 54-123 through 54-126, and it also enjoys the limitation of liability in the case of wrongful death or injury, Section 54-107, and it may assess and prosecute for fines and penalties, Sections 54-36, 54-54, 54-123. It may operate terminal railroads, Section 54-20. It has the power of eminent domain, Section 54-15.

Therefore, there can be no doubt but that Appellee, South Carolina State Ports Authority, is in competition with every private warehouse and shipping company and with their employees, in the Port of Charleston and the surrounding ports, while at the same time it attempts to use the cloak of government to shield its actions from competition, and attempts to use the power of government to enforce its will over not only the Port of Charleston and the other ports of South Carolina, but also over all commerce, interstate and foreign, which passes through the Port of Charleston. Thus, it has invaded the province of the United States Government, and thereby burdened unduly interstate and foreign commerce.

The Port of New York allows labor organizations on its waterfront, and these members are subject to the Labor-Management Reporting and Disclosure Act. New York and New Jersey went to Congress first to set up the Waterfront Commission of New York Harbor, and it exists with the state laws. N.Y. Unconsol. Laws. § 6700, et seq. *Bell* v. *Waterfront Commission of New York Harbor* (1960 D.C.N.Y.) 183 F. Supp. 175, Affirmed 279 F. 2d 853; *DeVeau* v. *Braisted* (1960, N.Y.) 80 S. Ct. 1146, 363 U.S. 144, 4 L. Ed. 2d 1109; *Applegate* v. *Waterfront Commission of New York Harbor* (1960 D.C.N.Y.) 184 F. Supp. 33.

Under the *Jacobsen* case, supra, and under *Stratton* v. *St. Louis Southwestern Railway Company* (1930) 282 U.S. 10, 75 L. Ed. 135, 51 S. Ct. 8; *Ex Parte Metropolitan Water Co.* 220 U.S. 539, 55 L. Ed. 575, 31 S. Ct. 600, *Ex Parte Atlantic Coast R Co.* 279 U.S. 822, 73 L. Ed. 977, 49 S. Ct. 600; *Ex Parte Northern Pacific Railway Company, et al*, 280 U.S. 142, 74 L. Ed. 233, 50 S. Ct. 70; *Ex Parte Cogdell* (1951) 342 U.S. 163, 96 L. Ed. 181, 72 S. Ct. 196, the Three-Judge District Court should have ruled on the constitutionality of the laws incorporated by reference in Appellee's Complaint, Sections 54-1 through 54-171 of the Code of Laws of South Carolina, 1952, as amended. These laws were set out in Paragraph First of the Appellee's Complaint.

In addition, the Appellee's Complaint shows that the Appellant labor union, through its employees, was picketing the facilities of the Plaintiff. Neither the Complaint, nor the Affidavit, nor the ex parte temporary injunction, even intimate that there was any mass picketing or violence. That being the case, Appellants have sought and obtained state court injunctive relief against conduct protected by Amendment I of the United States Constitution. *Youngdahl*, supra; *Thornhill* v. *Alabama* (1940) 310 U.S. 88; *Carlson* v. *California* (1940) 310 U.S. 106; *Teamsters* v. *Hanke* (1950) 339 U.S. 470.

In the instant case, the picketing as alleged was informational (see Paragraph Seventh of Appellee's Complaint), and there was no alleged clear and present danger of any violence or any mass picketing.

The United States Supreme Court has held the National Labor Relations Act constitutional and a valid exercise of federal power over interstate and foreign commerce, by setting up a uniform scheme for labor relations in and for interstate

and foreign commerce. *N.L.R.B.* v. *Jones and Laughlin Steel Corp.* (1937) 301 U.S. 1. Control of Congress over interstate commerce is not to be limited by state laws. *U. S.* v. *Hill* (1919) 248 U.S. 420, 425. Direct regulation by a state of interstate and foreign commerce is out of the question. *Simpson* v. *Shepard* (1913) 230 U.S. 352. The interplay of federal and state interests must be balanced. *Southern Pacific* v. *Arizona* (1945) 325 U.S. 761, 766-770. No form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. *U. S.* v. *Wrightwood Dairy Co.* (1942) 315 U.S. 110, 119. State legislative policy cannot infringe upon Congress' right to regulate interstate commerce. *Gibbons* v. *Ogden* (1824) 9 Wheat. 1; *Pensacola Telegraph Co.* v. *Western Union Co.* 96 U.S. 1; *Chicago & N.W.R. Co.* v. *Fuller*, 17 Wall. 5.

In many other cases, the Supreme Court has held that Congress has an interest in allowing labor the right to bargain collectively, and to organize, on the theory that the security and efficiency of interstate and foreign commerce is enhanced if labor is given these rights, and may be impaired if these rights are not granted and protected. *Southern Railway Co.* v. *U. S.* (1911) 222 U.S. 20; *Baltimore & Ohio Railway* v. *Interstate Commerce Commission* (1911) 221 U.S. 612, 618, 619. *Mondou* v. *N.Y., N.H. & H. R. Co.* 223 U.S. 1; *Texas & N. O. R. Co.* v. *Brotherhood of R. & SS Clerks* (1930) 281 U.S. 540. In *Kelly* v. *Washington* (1937) 302 U.S. 1, as to interstate commerce, if Congress has established a uniform rule, a state may not impose standards upon vessels plying interstate commerce that pass beyond what is plainly essential to safety and sea-worthiness.

In this case, it is apparent from Sections 54-1 through 54-171, supra, that in many respects the South Carolina State

Ports Authority is in business and is operating in a *proprietary* capacity and *not* in a *governmental* capacity.

The Supreme Court of the United States has recognized the difference between governments acting in their governmental capacity and in their proprietary capacity. *Burns* v. *Dist. of Columbia*, 91 U.S. 540, 23 L. Ed. 440. It has been argued that in South Carolina there is no distinction between governmental and corporate duties and a municipality is not liable for torts in any case unless made so by statute. *Iavine* v. *Greenwood*, 89 S.C. 511, 72 S.E. 228, 36 A.L.R. 363; however, our position on this matter is that the Supreme Court has recognized this difference in the functions, and our South Carolina decisions have also recognized this difference, and we cite:

> (1) State which comes into its own court to assert property right is bound by all the rules established for the administration of justice between individuals. *State of S. C.* v. *Columbia Railway Gas & Elec. Co.*, (1924) 124 S.E. 758, 129 S.C. 455.
>
> (2) *Hopkins* v. *Clemson Agricultural College of South Carolina* (1911) 31 S. Ct. 654, 221 U.S. 636, 55 L. Ed. 890, states that a public corporation such as an agricultural college receiving state aid and invested with municipal powers *cannot avail itself of the state's constitutional immunity* from suit in a proceeding against it for constructing *under state authority*, but *for its own corporate purposes and advantages*, a dyke upon land owned by the state, but in the use, possession and enjoyment of the college, so as to damage or take private property without due process of law.

Here there is a clear distinction between the state and a corporation created by a state.

(3) A federal court can enjoin a state statute fixing railroad rates. *Clyde* v. *Richmond and D. R. Co.* (1893) 57 F. 436.

(4) In the *Fort Fetterman* case, 261 F. 2d 563, it was held that recoupment or set-off could be had against the state in federal courts.

(5) In any event, the Supreme Court has recognized that when South Carolina engages in a business, it is subject to federal regulation. *U. S. A.* v. *South Carolina*, 199 U.S. 437, 26 S. Ct. 110.

However, Appellee is not a political subdivision in the strict sense of the term, and is not immune from 29 U.S.C.A. 141, et seq., since it is not a political subdivision of a state and in no sense is acting in its governmental capacity.

It is not a political subdivision because:

(1) The language creating the Plaintiff states that it is an instrumentality and does not nominate it as a political subdivision, and the language creating the Plaintiff allows it to engage in business.

(2) In *Bolen* v. *Board*, 308 S.W. 2d 904, a political subdivision is defined as follows: "A political subdivision contemplates geographical area and boundaries, public elections, public officials, taxing power and a general public purpose or benefit." Here a *housing authority* was held not to be a political subdivision.

(3) In *Arkansas State Highway Commission* v. *Clayton*, 292 S.W. 2d 77, 79, 226 Ark 712, it was stated that . . . "political subdivisions" embrace a certain territory and its inhabitants organized for public advantage and not in the interest of particular individuals or classifica-

tions and their chief design is the exercise of governmental functions and to the electors residing within each subdivision is, to some extent, committed the power of local government to be wielded within their territory for the peculiar benefit of the people there residing." Here the State Highway Commission was held not to be a political subdivision.

(4) A municipal corporation has been held not to be a political subdivision. *Anderson* v. *City of Long Beach*, 341 P. 2d 43, 46; *Abbott* v. *City of Los Angeles*, 326 P. 2d 484, 501, 50 Cal. 2d 438.

(5) A city has been held not to be a political subdivision of a state. *Kansas City* v. *Cain*, 317 S.W. 2d 331, 333.

(6) A statutory conservation district known as Grand River Dam Authority is not a political subdivision of a state. *Sheldon* v. *Grand River Dam Authority*, 76 P. 2d 355, 362, 182 Okl. 24.

(7) A school district is not a political subdivision of the state. *Kugler* v. *Tillotson* (Mo.) 300 S.W. 2d 517, 518; *Dahm* v. *Goodin* (Mo.) 295 S.W. 2d 600, 603; *Gray* v. *School Dist. No. 73 of Clay County*, 20 S.W. 2d 657, 658.

(8) In *Standard Oil Co.* v. *Nat. Surety Co.*, 107 So. 599, 560, 143 Miss. 841, it was stated that "a political subdivision is a subdivision thereof to which has been delegated certain functions of government."

(9) In *City of Miami* v. *Lewis* (Fla.) 104 So. 2d 70, 72, 73, it was stated that "To the extent that *governmental functions* are discharged within prescribed area and consistent with its grant of authority a municipal

corporation exercises attributes of sovereignty and as such is a political subdivision or arm of the state." (Emphasis added)

(10) "City when acting in its *public* or *governmental capacity* as agent or instrumentality of state is a political subdivision, within statute exempting from requirement of appeal bond a political subdivision." (Emphasis added) *Wolf* v. *City of Columbus*, 129 N.E. 2d 309, 311, 98 Ohio App. 333. Note the "public or governmental" qualification.

(11) State Highway Department is not a political subdivision. *State Highway Comm.* v. *Hudspeth* (Mo.) 297 S.W. 2d 510, 512. *Christensen* v. *State Highway Comm.* (Mo.) 40 S.W. 2d 615, 616.

(12) In *United States* v. *Grand River Dam Authority*, a June 13, 1960, case, the Supreme Court had no difficulty in holding that the Grand River Dam Authority "a governmental agency and body politic and corporate" could sue and be sued in the United States Courts, and this agency or instrumentality has been ruled not a political subdivision. (6, supra)

(13) In *Plumbers, Steamfitters, Refrigeration, Petrolcum Fitters and Apprentices of Local 298, A.F.L.* v. *County of Door, a municipal corporation*, 359 U.S. 354, 79 S. Ct. 844, 3 L. Ed. 2d 872 (May 4, 1959) the Supreme Court has stated, with respect to a county in Wisconsin seeking an injunction against the picketing of its courthouse by a union: "Respondents attempt to distinguish the case by claiming that a political subdivision must be expressly included in a statute if it is to be considered within the law's coverage and that essential state functions will be impaired if the county is subjected to

> N. L. R. B. coverage. But this Court has many times held that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law."

We therefore interpret this recent Supreme Court expression to mean that political subdivisions must go before the N. L. R. B. and, in the absence of violence, cannot use the state courts for injunctive relief in labor disputes.

We further contend that this decision is the controlling law on the question of an alleged political subdivision and its sources of relief in labor disputes.

We finally conclude that the state courts have no jurisdiction and no authority to provide injunctive relief in labor disputes, notwithstanding the fact that a "political subdivision" or "instrumentality" of the state is involved as a party. This case leaves no doubt but that the field of labor disputes has been preempted by the federal government.

In the Harvard Law Review, Vol. 74, No. 4, February, 1961, at Page 714, there is a law note on the applicability of sovereign immunity to independent public authorities, which note treats generally the question of whether or not independent authorities should be able to avail themselves of sovereign immunity for torts. Quoting from Page 714, it is said:

> "Although the types of facilities independent authorities ordinarily run—port terminals, airports, bridges, highways—require coordinated planning in the public interest, they can be required to meet expenses with the income earned from their operation. Since authorities do not rely significantly on public funds, legislatures have felt it proper to promote the necessary efficiency and stability

by freeing them from normal bureaucratic checks and political pressures. For instance, they usually need not deposit their funds in the state treasury, use centrally directed accounting procedures, or the state purchasing agency, or submit their expenditures to audit by the state. The authority's governing board is usually empowered to establish jobs, select personnel on the basis of qualifications which it determines, and to fix salaries. Further, it is under no obligation, as municipal corporations often are, to obtain voter approval of new projects requiring bond issues. More important, although the undertaking of a major project may often require approval by the legislature or by some government agency occupying a more orthodox place in the political structure, they are not subjected to the same scrutiny that a legislature would devote to a program requiring an appropriation."

At Page 720:

"The powers of public authorities, exercised free of significant political supervision are broad. They issue revenue bonds, fix tolls and other charges out of which to pay expenses, take land by eminent domain, enter contracts, lease or purchase appropriate facilities, make agreements with municipalities for payments in lieu of taxes, and occasionally police their facilities and issue regulations enforced by penal sanctions. Furthermore, authorities usually have effective monopolies in their assigned fields. Sometimes this is assured by law, such as the New York-New Jersey compact giving the Port of New York Authority exclusive rights to operate bridges and tunnels across the Hudson River with the Port District. N. Y. Unconsol. Laws 6482 (McKinney 1953) N. J. Rev. Stat. S. 32:1-129 (1937). In other instances

> there is a de facto monopoly; a company formed for profit, without power to condemn land, and itself having no state guarantee of monopoly, could not compete, and the state is unlikely to betray its own creation."

This summarizes some of the differences between authorities such as Appellee and a state acting in its governmental capacity.

On Page 724, under "Conclusion" it is said:

> "The policies behind sovereign immunity would not be significantly infringed by a complete refusal to apply the doctrine to independent authorities."

and on Page 725:

> "When governmental bodies are involved whose complete liability to suit would not seriously infringe either of those interests, it would seem that the interests clearly sought to be advanced by such a clause ["sue and be sued" clause] facilitating the body's commercial functioning and compensating injured parties, can be fully satisfied. To this end, the clause may be interpreted literally, as in general statutes governing private corporations, to create a juristic person legally responsible for all its tortious and contractual wrongs."

We respectfully submit that the face of Appellee's Complaint was certainly blemished with federal questions, and that, under the commerce clause, and the first, fifth and fourteenth amendments, a fair reading of the allegations of the Complaint show federal questions which were not decided by the Three-Judge United States District Court. We further submit that the Three-Judge United States District Court erred in not ruling Sections 54-1 through 54-171 unconstitutional, and in remanding the Complaint. By this rul-

ing the Three-Judge United States Court in effect ruled that no federal questions existed on the face of the Complaint. The court therefore ruled that Sections 54-1 through 54-171 were constitutional.

(E) Whether or not the Three-Judge Court erred in not hearing questions of the constitutionality presented by the Appellants' Counterclaims even after Appellee's Complaint had been remanded?

(F) Whether or not the Three-Judge Court erred in remanding Appellants' Counterclaims to the state courts of South Carolina when Appellants' Counterclaims had never been in the state courts of South Carolina?

Questions (E) and (F) can be considered together.

Appellants' Amended Answer and Counterclaims, along with Appellants' Motion to Dismiss the temporary injunction, and motion for summary judgment were never in the state courts of South Carolina. Even if the Complaint were remanded, the Appellants would have been allowed to plead to the Appellee's Complaint in the state court.

The six counterclaims did not simply allege defensive material but they alleged substantial grounds of unconstitutionality of the state statutes, including the ground that Appellee interfered with Appellants' freedom of contract, and that the statutes violated Article I, Sections 8, 9 and 10, Article III, Article IV, and Amendments I, V, IX, XIII, and XIV of the United States Constitution.

Therefore, even if the Complaint was remanded, the Counterclaims should have been allowed to stand and the Three-Judge United States District Court should have ruled on the attacks of the counterclaims upon the constitutionality of the state statutes alleged to be unconstitutional.

The Appellants fully recognize that the general rule applicable in questions of remand is that the Complaint is the only pleading which may be considered in order to determine whether or not a federal questions have been presented; however, in South Carolina there is a policy against multiplicity of suits (*Griffen* v. *Scott*, 203 S.C. 430, 27 S.E. 2d 570) and a cause of action must not be split (*Lawton* v. *New York Life Insurance Co.* (1936) 181 S.C. 230, 186 S.E. 909). In addition, in *Mitchell* v. *Federal Intermediate Credit Bank of Columbia*, 165 S.C. 457, 164 S.E. 136, 83 A.L.R. 629, it was held that one who sets up as a defense to an action on promissory notes, liability to him of the holder in a sum in excess of the amount of the notes, without seeking affirmative relief, cannot, even though successful in establishing such defense, thereafter maintain a separate action against such holder for the balance. In South Carolina, our Code Section 10-705, Code of Laws of South Carolina (1952) as Amended, provides that:

> "In all actions sounding in tort the Defendant shall have the right to plead a similar cause of action against the Plaintiff by way of counterclaim if the cause of action against the Plaintiff and the Defendant arise out of the same state of facts."

Although Judge Lanneau D. Lide in his article in 4 S. C. Law Quarterly, at Page 433, entitled Res Adjudicata in South Carolina, does not definitely resolve the question, it is our interpretation that a counterclaim must be pleaded or be lost.

Therefore, we feel that the Complaint, together with our counterclaims, should be viewed in order to see if a federal questions exists, and the reasoning of Barron and Holtzoff in Vol. I of Federal Practice and Procedure, at Pages 487-488, supports this view.

We respectfully submit that the Three-Judge District Court erred in not considering the questions of constitutionality presented by Appellants' Counterclaims after the Appellee's Complaint had been remanded, and we respectfully submit that the Three-Judge District Court erred in remanding Appellants' Counterclaims to the state courts of South Carolina when the Counterclaims had never been in the state courts of South Carolina.

> "(G) Whether or not the Three-Judge United States District Court erred in determining that neither the Complaint nor the Answer and Counterclaim stated federal questions?

In addition to our foregoing arguments, we respectfully submit that in order for the Three-Judge United States District Court to correctly determine that no federal questions existed in the Complaint or the Counterclaims, they would have to determine the following.

(1) That 29 U.S.C. 141, et seq. is not an Act of Congress regulating commerce, or that the allegations of Appellee's Complaint could not even arguably show an unfair labor practice under 29 U.S.C. 141, et seq.

(2) That peaceful picketing without any clear and present danger of violence, disturbance of the peace, or mass picketing, is not protected activity under the First Amendment.

(3) That a state may clothe itself with immunity from 29 U.S.C. 141, et seq., regardless of what business it endeavors to enter and regardless of whether or not interstate and foreign commerce is thereby regulated.

We respectfully submit that this is not now and has never been the law of the land, and that the Three-Judge United States District Court erred in not determining that both

Appellee's Complaint standing alone, or Appellants' Amended Answer and Counterclaims stated federal questions.

THESE QUESTIONS ARE SUBSTANTIAL.

The questions presented are substantial procedurally and substantially.

Section 1253 of Title 28 of the United States Code provides that "any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action or suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The effect of the remand by the Three-Judge Court was to deny Appellants' petition for an injunction against the operation of the state statutes. In *Florida Lime & Avocado Growers* v. *Jacobsen* (supra), it was held that the Supreme Court of the United States had jurisdiction of a direct appeal from a judgment of a three-judge district court dismissing an action to enjoin state officers from enforcing a state statute.

Before the Three-Judge United States District Court could have remanded Appellee's Complaint, the Three-Judge District Court had to overrule the Appellants' Motion to Dismiss Appellee's Complaint, because a nullity removed is still a nullity, and cannot be remanded. Therefore, this action is based on the failure of the Three-Judge Court to grant Appellants' Motion to dismiss the Complaint, and consequently the state court injunction. The ground for this motion was that Appellee's Complaint did not state a claim upon which relief could be granted due to the Appellee's allegations of facts, the truth of which could only be determined by the National Labor Relations Board, since Congress has preempted this field by the enactment of 29 U.S.C. 141, et seq., as Amended.

Substantively, the questions presented in this appeal concern the extent to which Congress has acted to regulate the instrumentalities of interstate and foreign commerce. These questions are of importance to all public authorities, to all who engage in interstate and foreign commerce, and to all who labor in interstate and foreign commerce.

These questions are substantial because they are based on interpretations of Acts of Congress regulating commerce, and they involve the authoritative statements of the law by this Court in the "piggyback" and *Door County* cases (supra). These questions are of public importance and their solution will determine just how compelling the language in Title 28 Sections 2281, 2283 and 2284, and in Title 28, Section 1253, actually is.

CONCLUSION

The questions presented are of substantial importance, and we respectfully submit that if Appellee is allowed to cloak itself with sovereign immunity, even though it is acting in a proprietary sense, and evade the operation of Title 29 U.S.C. 141, et seq., then a natural extension of this doctrine would allow a state to enter any area of enterprise, no matter how unrelated to the business of government or the public welfare, enjoy all the benefits of sovereign stability without subjecting itself to any of the burdens of competitive free enterprise. A state could then establish de facto monopolies in any chosen field and avoid Acts of Congress regulating commerce by its sovereign immunity even though state action directly burdened interstate and foreign commerce.

We further respectfully submit that the enabling acts of the Appellee directly burden interstate and foreign commerce, and so are unconstitutional, and that Congress has pre-

empted the field of protected employee activity and unfair labor practices by 29 U.S.C. 141, et seq., and the state court injunction cannot stand.

Respectfully submitted,

MORRISON & MORRISON
WM. McG. MORRISON, JR.
Attorneys for Appellants

April, 1961

APPENDIX

INDEX TO APPENDIX

Page

APPENDIX A

Order and Opinion of Three-Judge Court 1a

APPENDIX B

Appellee's Complaint, Affidavit, and Temporary Injunction 4a

APPENDIX C

Appellants Amended Answer and Counterclaims 9a

APPENDIX D

Appellants Motions to Dismiss the Appellees Complaint and Motion to Dismiss the Temporary Restraining Order 21a

APPENDIX E

Sections 54-1 through 54-171 of the Code of Laws for South Carolina 1952, (as amended) 22a

APPENDIX A

ORDER

A motion to remand this case, commenced originally in the Court of Common Pleas for Charleston County, South Carolina; having been made and fully heard, and it appearing to the Court that the case was improvidently removed from the State Court, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the case should be, and it hereby is, remanded to the Court of Common Pleas for Charleston County, South Carolina.

CLEMENT F. HAYNESWORTH, JR.
United States Circuit Judge

C. C. WYCHE
United States District Judge

ASHTON H. WILLIAMS
United States District Judge

Charleston, South Carolina

OPINION

PER CURIAM. This action was commenced by the South Carolina State Ports Apthority in the Court of Common Pleas for Charleston County, South Carolina, and was removed by the defendants to this court. A motion to remand has been heard. We think it should be granted.

The complaint alleges that the defendants who do not represent the employees of the plaintiff placed pickets at certain of the plaintiff's buildings and facilities, with resulting disruption of the plaintiff's operations. It sought an injunction against the maintenance of the picketing. A temporary restraining order was granted by the State Court.

It is apparent that the complaint states a cause of action, arising under State law, for conspiracy to interfere with the operations of the plaintiff. The asserted cause of action is in no sense dependent upon the laws of the United States and does not arise out of any such law. The complaint does contain an allegation that the plaintiff is a subdivision of the State of South Carolina, and, as such, is specifically exempt from the National Labor Relations Act, as amended,* but this is merely an anticipation of the defendants' defensive position that the plaintiff is not a subdivision of the State, within the meaning of the National Labor Relations Act, is subject to the substantive provisions of that Act, and that exclusive jurisdiction of the controversy is vested by that Act in the National Labor Relations Board. It is well settled that such anticipatory matter in the complaint does not furnish a basis for Federal jurisdiction, and it cannot justify removal of the action from the State Court. Gully vs. First National Bank 299 U. S., 109; Third Street and Suburban Railway Co. vs. Lewis, 173 U. S. 457.

*29 U. S. C. A. Section 152, et seq.

After removal of the case to this Court, the defendants filed an answer and counterclaim, later amended, in which they asked for affirmative relief, including an injunction and pecuniary damages for interference with their asserted rights. Because the defendants asked in their counterclaim for an injunction against enforcement of the State statute which authorizes the plaintiff to perform its functions and operations, a special three-judge court was convened under the provisions of 28 U. S. C. A., Section 2281, et seq. The Defendants do not contend, however, that reference to the counterclaim may be had in aid of the removal of the case from the State Court. The authorities conclusively foreclose such a contention, and in considering this motion to remand, we consider only whether or not the complaint states a cause of action arising under the laws of the United States. Since it does not, the motion to remand must be granted.

The allegations of the counterclaim are largely defensive. To the extent it asks for affirmative relief because of injury flowing from the State Court injunction, it should be heard in the State Court and not allowed as a collateral attack in this court upon the State Court's injunction. To the extent that it asks relief because of the plaintiff's performance through its own employees of work of the nature done by private shipping companies through employees represented by the defendant unions, it alleges no breach of contract or tortious act and fails to state a claim upon which relief can be granted in this court.

We conclude that the case was improvidently removed from the State Court. The motion to remand will be granted.

APPENDIX B

COMPLAINT

The plaintiff above named, complaining of the defendants above named and identified, alleges:

FIRST: Plaintiff is a body corporate and politic, created as an instrumentality of the State of South Carolina, with certain rights, duties and powers as set forth in Sections 54-1 through 54-64 of the South Carolina Code of laws, 1952, as amended.

SECOND: That among the purposes for which the plaintiff has been created is the purpose to foster and stimulate the shipment of freight and commerce through the ports of the State of South Carolina, including the port of Charleston, and "to do and perform any act or function which may tend to or be useful toward the development and improvement of waterborne commerce, foreign and domestic, through said harbors and seaports," including the Port of Charleston.

THIRD: That among the powers specifically vested in the plaintiff is the power to "appoint and employ and dismiss at pleasure such employees as may be selected by the board" of the plaintiff, and to "fix and pay the compensation thereof."

FOURTH: At all times hereinafter mentioned the defendant, Local 1422 of The International Longshoremen's Union, AFL-CIO, was and is a voluntary unincorporated association with its principal place of business in the City of Charleston, County and State aforesaid; the said association has duly elected officers, whose names are unknown to plaintiff, and whose members are too numerous to name individually, but some of whom are, as plaintiff is informed and believes, Bruce Bennett, Louis Johnson, Willie Davis, L. Baxley and Zacharias Failey, and who are acting for themselves and for the other defendants in the striking and/or picketing activities hereinafter more particularly mentioned, all of whom are made parties to this

proceeding as a class and all of whom, as plaintiff is informed and believes, are residents of the County and State aforesaid; and that defendant George German is president, representative and spokesman of the said Local 1422 of the International Longshoremen's Union, AFL-CIO, and is a resident of the County and State aforesaid.

FIFTH: That pursuant to its powers set forth in paragraph Third, above, the plaintiff employs a large number of workmen, agents and servants in and about its terminal facilities located in the City and County of Charleston, State aforesaid; and in the employment of the said workmen, agents and servants the plaintiff fixes their compensation and, when necessary, dismisses such of them as it becomes necessary to dismiss.

SIXTH: That plaintiff has not now, and has never had, any union contract or union agreement with the above named defendant local union, or the above named and identified individual defendants, who are engaged in striking and/or picketing the plaintiff's facilities as hereafter more particularly set forth; and that plaintiff is specifically exempted from the terms and provisions of the Federal National Labor Relations Act (29 U. S. C. A., Sec. 152) since plaintiff is a political subdivision of a State.

SEVENTH: On the 8th day of December, 1960, the defendants, their pickets, agents and servants, commenced, and are now continuing, to strike and/or picket the terminal facilities of the plaintiff at the Port of Charleston, South Carolina, by placing their pickets in front of and immediately adjacent to the main entrances to plaintiff's terminal facilities at the Port of Charleston (both within and without the limits of the City of Charleston) carrying signs and placards reading as follows:

NON-UNION
STATE
DOCKS
UNFAIR TO
International
Longshoremen Assn.
A.F.L. - C.I.O.

EIGHTH: In striking and/or picketing the facilities of the plaintiff as set forth in paragraph Seventh the defendants were and are and continue to be guilty of an unlawful conspiracy to limit the powers specifically vested in the plaintiff as an instrumentality of the State of South Carolina.

NINTH: The plaintiff as a body corporate and politic and as an instrumentality of the State of South Carolina is immune from the right of any of its terminal employees to strike or picket its facilities.

TENTH: The defendants, unless enjoined by this Court, threaten to continue the acts complained of herein, all to the plaintiff's irreparable damage and detriment for which the plaintiff has no adequate remedy at law, because the actions of the defendants unless enjoined will substantially disrupt the shipment and handling of freight and commerce through the Port of Charleston and will bring to a substantial halt water-borne commerce through the said port, thus defeating the very purposes for which the plaintiff was created.

WHEREFORE, the plaintiff prays that the defendants, and each of them, their agents, servants, employees and those acting under their direction and control and in conjunction with them, be enjoined permanently and during the pendency of this action from engaging in striking and/or picketing any and all of the facilities of the plaintiff located in the City and the County of Charleston, State aforesaid, and from threaten-

ing, intimidating or coercing plaintiff's employees and from otherwise interfering with the conduct and operation of the plaintiff's said facilities; that a temporary restraining order be issued immediately pending hearing on said application for permanent injunction; and that the plaintiff have such other and further relief as to this Court may seem just and proper, including an award of money damages to compensate the plaintiff for its pecuniary losses.

FIGG, GIBBS & GRIMBALL,
Attorneys for the Plaintiff.

STATE OF SOUTH CAROLINA,
COUNTY OF CHARLESTON.

PERSONALLY Appeared before me COTESWORTH P. MEANS who, being duly sworn, says that he has read the foregoing Complaint and that the same is true of his own knowledge, except as to those matters and things therein stated to be alleged upon information and belief, and that as to those he believes it to be true; that this verification is not made by the plaintiff South Carolina State Ports Authority because it is a body corporate and politic under the laws of the State of South Carolina, and deponent is an officer thereof, to wit, its Chairman, and duly authorized to make this verification.

SWORN to and subscribed before me
this 8th day of December, 1960.

s/Cotesworth P. Means

s/Coming B. Gibbs
Notary Public for South Carolina.

AFFIDAVIT

STATE OF SOUTH CAROLINA,
COUNTY OF CHARLESTON.

PERSONALLY Appeared before me COTESWORTH P. MEANS who, being duly sworn, deposes and says that he is the Chairman of the South Carolina State Ports Authority, the plaintiff above named, that the illegal activity of the defendants herein in striking and picketing against the facilites of the plaintiff, unless enjoined, will cause irreparable damage to the plaintiff, that because of this activity it is impossible to load two ships which are now in port, and that the plaintiff will be unable to service nine ships which are scheduled to arrive in the Port of Charleston on December 9, 1960, and, further, that it may become necessary to divert these ships from the Port of Charleston to some other destination, and that the commerce through the Port of Charleston will practically come to a standstill; further, that the plaintiff will lose substantial sums of money because of its inability to service these ships, since the plaintiff will be unable to collect dockage fees, wharfage fees, and fees for handling and warehousing cargoes; and, finally, deponent says that he has read the Complaint in this cause, and that the same is true, except for those matters therein declared to be upon information and belief, and that as to those he believes the same to be true.

SWORN to and subscribed before me
this 8th day of December, 1960.

s/Cotesworth P. Means

s/Coming B. Gibbs
Notary Public for South Carolina.

TEMPORARY INJUNCTION

This cause came before me today on the plaintiff's sworn complaint and the affidavit of Cotesworth P. Means, Chairman of the plaintiff; and the Court having considered these pleadings, and it appearing that a temporary restraining order should be granted, now, therefore, on motion of Messrs. Figg, Gibbs & Grimball, attorneys for the plaintiff.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the defendants, and each of them, their agents, servants, employees, and those acting under the direction and control and in conjunction with them, are hereby enjoined and restrained, until further order of this Court; from striking and/or picketing any and all of the facilities of the plaintiff located in the City and in the County of Charleston, State of South Carolina, and from otherwise interfering with the conduct of the plaintiff's work and business; further ORDERED that the Sheriff of Charleston County forthwith serve upon each of the defendants hereinabove named copies of this temporary restraining order and of the summons and complaint and affidavit upon which the said temporary restraining order has been applied for and granted.

s/John Grimball
Judge, Ninth Judicial Circuit.

Charleston, S. C.
December 8th, 1960.

APPENDIX C

AMENDED ANSWER AND COUNTER-CLAIM

Defendants above named, answering the Complaint of the Plaintiff above named, herein allege and say:

FOR A FIRST DEFENSE:

FIRST: These Defendants specifically deny each and every allegation contained in said Complaint not hereinafter specifically admitted.

SECOND: These Defendants admit that the Defendant, Local 1422, International Longshoremen's Association, A.F.L.-C.I.O., was and is a voluntary unincorporated association, with its principal place of business in the City and County of Charleston, State aforesaid; that George German is President, representative and spokesman of the said Local 1422 of the International Longshoremen's Association, A.F.L.-C.I.O., and is a resident of the County and State aforesaid, and that some of the Defendants are citizens and residents of the County of Charleston, State aforesaid.

FOR A SECOND DEFENSE
AND AS A COUNTER-CLAIM:

THIRD: That the allegations of the first defense are hereby adopted and incorporated by reference in this defense as if specifically herein set forth.

FOURTH: That the Plaintiff is not solely a creature of the State of South Carolina and an instrumentality thereof, but is engaged in the operation of a business which, in fact, includes the operation of docks and warehouses, the handling and warehousing of cargoes, the handling, tying up and untying of ships at the docks, and the performance of many other and varied acts not consistent with mere governmental function, but concerned with the operation of a business.

FIFTH: That the Defendants and private shipping companies at the Port of Charleston have in the past bargained collectively and contracted for the handling of ships at the

docks, the loading and unloading of ships, the handling and warehousing of cargoes, the tying up and the untying of ships, and the storage and arranging of the warehousing of materials or goods shipped on the ships, and other acts relative to the docking, unloading and transporting of goods in interstate and foreign commerce.

SIXTH: The trade that comes through the Port of Charleston is foreign trade and interstate trade and directly affects interstate commerce and foreign commerce and is, in effect, interstate commerce and foreign commerce, and the Plaintiff, the Defendants and the shipping companies are engaged in interstate and foreign commerce.

SEVENTH: That the Plaintiff has usurped the functions of the shipping companies and the Defendants herein in the matters above listed, and has interfered with and abridged their freedom of contract and has violated their rights guaranteed to them by the Constitution of the United States, and has encroached upon rights protected and fields preempted by the Constitution of the United States and by the laws of the United States, and such parts of the United States Constitution which have been violated by the Plaintiff are Article I, Section 8, Section 9 and Section 10, Article III, Article IV, and Amendments I, V, IX, XIII and XIV.

EIGHTH: That the conduct of the Plaintiff in demanding that its warehousemen and its employees only, shall tie up and untie ships, shall make ships secure to the docks, shall move all stores on and off of ships, and shall handle ship lines on all arriving and departing ships, and shall exclusively operate the docks and warehouses, and the actual performance by the Plaintiff and its employees of these functions and other related functions amounts to an undue burden upon interstate commerce and upon foreign commerce, and therefore the

enabling acts of the Plaintiff, Sections 54-1 through 54-171 of the Code of Laws of South Carolina, 1952, as amended, are unconstitutional as violative of the United States Constitution and laws, and if the entire enabling acts establishing the Plaintiff Authority are not violative of the United States Constitution and laws, then the parts of these acts in Sections 54-1 through 54-171 of the Code of Laws of South Carolina, 1952, as amended, which allow the Plaintiff to engage in the aforementioned activities are void and unconstitutional and in conflict with the Federal laws and the Constitution of the United States, and if any parts of the aforementioned Code Sections of the Code of Laws of South Carolina, 1952 as amended, are not unconstitutional, then the abovementioned acts and conduct of the Plaintiff in this allegation places an undue burden upon interstate commerce and upon foreign commerce, and therefore this conduct of the Plaintiff is violative of the Constitution of the United States and the laws of the United States, and the Constitution and laws of South Carolina, and some of the parts of the United States Constitution which are violated are Article I, Section 8 (particularly but not only Clause 3), Article I, Sections 9 and 10, Article III, Article IV, and Amendments I, V, IX, XIII and XIV.

NINTH: That the Plaintiff makes charges and collects fees and charges wharfage fees, dockage fees, and fees for handling and warehousing cargoes, and such fees are discriminatory and an undue burden upon interstate commerce, and amount to a tax upon interstate commerce and upon foreign commerce, and as such a tax is an undue burden upon interstate and foreign commerce, and the Plaintiff and its conduct is violative of the United States Constitution, laws and treaties, and the laws of South Carolina, and even if these fees and amounts are not discriminatory, they amount to an undue burden both on interstate and foreign commerce, and as such

a burden, is repugnant to the United States Constitution, laws and treaties, and the South Carolina Constitution and laws.

TENTH: That the Plaintiff Authority obtained a temporary injunction or restraining order in the Court of Common Pleas for Charleston County on December 8, 1960, which injunction prohibited the Defendants in many ways from varied activities, and reference is had to the injunction or restraining order itself, which is part of the record in this cause, for the exact prohibitions against the Defendants, and the injunction, together with the usurping conduct of the Plaintiff which is more specifically set forth hereinabove, has proximately caused the Defendants to suffer irreparable damage in loss of wages, loss of work, loss of the right to bargain collectively, and has caused their rights of contract to be impaired, all of these acts proximiately causing the Defendants and each of them to be damaged irreparably.

FOR A THIRD DEFENSE
AND AS A COUNTER-CLAIM:

ELEVENTH: That the allegations of the first two defenses are adopted for this defense and are incorporated by reference as if herein specifically set forth.

TWELETH: That in the allegations of the Plaintiff's Complaint, the Plaintiff has alleged facts which, if true, show that the Defendants have committed acts which are unfair labor practices within the meaning of Title 29, Section 158, of the United States Code, as amended, and while the Defendants specifically deny that they have committed any unfair labor practice under this section and, in fact, contend that the conduct of the Defendants was at all times protected by Section 157 of United States Code, as amended, the Defendants contend that the exclusive tribunal so empowered by the Congress of the United States for the determination of whether

or not the facts of this controversy were in fact unfair labor practices, is the National Labor Relations Board.

THIRTEENTH: That the Plaintiff obtained a temporary injunction or restraining order in the Court of Common Pleas for Charleston County on December 8, 1960, which injunction prohibited the Defendants in many ways from varied activities, and reference is had to the injunction or restraining order itself, which is part of the record in this cause, for the exact prohibitions against the Defendants, and the injunction, together with the usurping conduct of the Plaintiff, which is more specifically set forth hereinabove, has proximately caused the Defendants to suffer irreparable damage in loss of wages, loss of work, loss of the right to bargain collectively, and has caused their rights of contract to be impaired, all of these acts proximately causing the Defendants and each of them to be damaged irreparably.

FOR A FOURTH DEFENSE AND AS A COUNTER-CLAIM:

FOURTEENTH: That the allegations of the first three defenses are adopted for this defense and incorporated by reference as if specifically herein set forth.

FIFTEENTH: That the picketing by the Defendant was peaceful picketing; that there was no mass picketing, nor was there any violence or any disorderly conduct, nor did this peaceful picketing disrupt the peace and good order of the City of Charleston, County of Charleston, or the State of South Carolina, so that this conduct was protected by Amendment I, Amendment V, IX, XIV, and by the laws and Constitution of the State of South Carolina.

SIXTEENTH: That the Plaintiff obtained a temporary injunction or restraining order in the Court of Common Pleas

for Charleston County on December 8, 1960, which injunction prohibited the Defendants in many ways from varied activities, and reference is had to the injunction or restraining order, which is part of the record in this cause, for the exact prohibitions against the Defendants, and the injunction, together with the usurping conduct of the Plaintiff which is more specifically set forth hereinabove, has proximately caused the Defendants to suffer irreparable damage in loss of wages, loss of work, loss of the right to bargain collectively, and has caused their rights of contract to be impaired, all of these acts proximately causing the Defendants and each of them to be damaged irreparably.

FOR A FIFTH DEFENSE
AND AS A COUNTER-CLAIM:

SEVENTEENTH: That the Code of Laws of South Carolina, 1952, as amended, and in particular, Sections 54-1 through 54-171, do not prohibit the bargaining with a duly constituted agent of the State employees for the purpose of wage discussions and working conditions and employment contract, and they do not prohibit the bargaining with the employees for the purposes of wage discussions, working conditions and employment contracts, and any construction of the laws to the contrary renders these laws or those parts of these laws which prohibit the abovementioned acts unconstitutional and violative of the Constitution and laws of the United States of America, and some of the parts of the Constitution of the United States which conflict with this construction of the aforementioned State laws are violative of the Constitution of the United States and the laws of the United States, and the laws of the State of South Carolina and its Constitution, and some of the parts of the Constitution of the United States which are so violated are Article I, Section 8 (particularly

but not only Clause 3 therein), Article I, Sections 9 and 10, Article III, Article IV, and Amendments I, V, IX, XIII and XIV.

EIGHTEENTH: That the workers and employees of the Plaintiff and the Defendants herein have the inherent right to bargain collectively with the Plaintiff through a representative in matters concerning wages, hours of employment and working conditions, and have the inherent right not to be discriminated against by so bargaining or joining a voluntary association for the purposes of such bargaining, and the Plaintiff has denied to the Defendants such rights, and the Plaintiff has discriminated against the Defendants herein, and against its workers and employees, and such conduct on the part of the Plaintiff is unconstitutional and violative of the United States Constitution and of the Articles, Sections and Amendments previously mentioned, and of the laws of the United States, and of the laws and the Constitution of the State of South Carolina.

NINETEENTH: That the Plaintiff obtained a temporary injunction or restraining order in the Court of Common Pleas for Charleston County on December 8, 1960, which injunction prohibited the Defendants in many ways from varied activities, and reference is had to the injunction or restraining order itself, which is part of the record in this cause, for the exact prohibitions against the Defendants, and the injunction, together with the usurping conduct of the Plaintiff, which is more specifically set forth hereinabove, has proximately caused the Defendants to suffer irreparable damage in loss of wages, loss of work, loss of the right to bargain collectively, and has caused their rights of contract to be impaired, all of these acts proximately causing the Defendants and each of them to be damaged irreparably.

FOR A SIXTH DEFENSE
AND AS A COUNTER-CLAIM:

TWENTIETH: That there exists an actual controversy between the Plaintiff and the Defendants in this cause and the United States District Court has jurisdiction of this cause, and it is within the jurisdiction of this Honorable Court.

TWENTY-FIRST: That the actual controversies in question are, in the judgment of the Defendants: (a) Whether or not the South Carolina State Ports Authority is an agency of the State of South Carolina and can sue and be sued in the United States District Court for the Eastern District of South Carolina; (b) Whether or not the alleged unfair labor practice existed should be within the exclusive jurisdiction of the National Labor Relations Board; (c) Whether or not the United States Courts are empowered to hear the questions concerning the unconstitutionality of the Code of Laws of South Carolina, 1952, as amended, which the Defendants have challenged in their Answer as unconstitutional; and (d) Whether or not the temporary injunction of the Court of Common Pleas for Charleston County should have been granted and whether or not it should remain in full force and effect.

TWENTY-SECOND: That the determination of these issues are necessary for a full determination of the factual issues in this cause and a final determination of this cause, and the Defendants have no other adequate remedy at law.

FOR A SEVENTH DEFENSE
AND AS A COUNTER-CLAIM:

TWENTY-THIRD: That the Defendants have no adequate remedy at law and that the Defendants and each of them have exhausted their remedies in the State Courts of the State of South Carolina in that, as these Defendants have been in-

formed and believe, this cause has been properly removed and that the Honorable John Grimball, Presiding Judge of the Court of Common Pleas, Ninth Judicial Circuit, has ruled, on December 27, 1960, that he has no further jurisdiction in this matter, since the cause has been removed to the United States District Court for the Eastern District of South Carolina, Charleston Division, and the temporary injunction against the Defendants continues is force and effect, and the Plaintiff still continues to usurp the functions of the Defendants and the shipping companies and to operate as a business, and to violate their rights of contract, and the Plaintiff continues to place an undue burden upon interstate commerce and foreign commerce.

TWENTY-FOURTH: That the Plaintiff Authority obtained the temporary injunction or restraining order in the Court of Common Pleas for Charleston County on December 8, 1960, which injunction prohibited the Defendants in many ways from varied activities, and reference is had to the injunction or restraining order itself, which is part of the record in this cause, for the exact prohibitions against the Defendants, and the injunction, together with the usurping conduct of the Plaintiff which is more specifically set forth hereinabove, has proximately caused the Defendants to suffer irreparable damage in loss of wages, loss of work, loss of the right to bargain collectively, and has caused their rights of contract to be impaired, and has deprived them of the right to peacefully picket and to do anything else to interfere with the Plaintiff, all of these acts proximately causing the Defendants and each of them to be damaged irreparably and to sustain irreparable damage with the passage of each day and hour.

TWENTY-FIFTH: That the Defendants can obtain no relief except through injunctive relief, both temporary and perma-

nent, and the Defendants have an equitable basis for this relief, and that the Supreme Court of South Carolina has not ruled on the constitutionality of the aforementioned state laws.

WHEREFORE, Defendants and each of them demand judgment against the Plaintiff including such money damages as this Honorable Court in its discretion may award, and pray that this Honorable Court order or render:

(a) A declaratory judgment under Rule 57 and Section 2201, et seq., U.S.C., as soon as may be rendered, on the following issues:

(1) Whether or not the South Carolina State Ports Authority is an agency of the State of South Carolina and can sue and be sued in the United States District Court for the Eastern District of South Carolina;

(2) The question whether the alleged unfair labor practices existed should be within the exclusive jurisdiction of the National Labor Relations Board;

(3) Whether or not the United States courts are empowered to hear the questions concerning the unconstitutionality of the Code of Laws of South Carolina, 1952, as amended, which the Defendants have challenged in their Answer as unconstitutional;

(4) Whether or not the temporary injunction of the Court of Common Pleas for Charleston County should have been granted in this cause, and whether or not it should remain in force in this cause.

(b) That this Honorable Court declare that Sections 54-1 through 54-171 of the Code of Laws of South Carolina, 1952, as amended, or parts of them, are unconstitutional, or that the conduct of the Plaintiff has deprived the Defendants of sub-

stantial rights guaranteed them by the Constitution of the United States and the laws of the United States and the Constitution and laws of the State of South Carolina.

(c) That this Honorable Court dissolve the injunction now in effect.

(d) That this Honorable Court order the unfair labor practice question to the National Labor Relations Board for final determination.

(e) That this Honorable Court order the costs and disbursements of this action be paid by the Plaintiff.

(f) That this Honorable Court issue a temporary injunction requiring the Plaintiff:

(1) To cease and desist from interfering with its rights of contract and property;

(2) To cease and desist from placing an undue burden upon interstate commerce and foreign commerce;

(3) To cease and desist from interfering with the Defendants' peaceful picketing.

g) That this Honorable Court grant a temporary injunction enjoining the operation of the State court temporary restraining order.

(h) That this Honorable Court issue a permanent injunction requiring the Plaintiff:

(1) To cease and desist from interfering with its rights of contract and property;

(2) To cease and desist from placing an undue burden upon interstate commerce and foreign commerce;

(3) To cease and desist from interfering with the Defendants' peaceful picketing.

i) That this Honorable Court issue a temporary injunction restraining Plaintiff Authority, through its Board members and the necessary officers and officials of the State of South Carolina, from the operation and enforcement and execution of Sections 54-1 through 54-171 of the Code of Laws of South Carolina, 1952, as amended, until this cause is settled.

(j) That this Honorable Court issue a permanent injunction restraining Plaintiff Authority, through its Board members and the necessary officers and officials of the State of South Carolina from the operation and enforcement and execution of Sections 54-1 through 54-171, of the Code of Laws of South Carolina, 1952, as amended, until this cause is settled.

(k) For such other and further relief as this Honorable Court may award in its discretion.

APPENDIX D

MOTION TO DISMISS TEMPORARY RESTRAINING ORDER

The Defendants move the Court as follows:

To dismiss the temporary restraining order in this cause on the grounds that said restraining order is causing the Defendants, and each of them, irreparable damage in loss of work, in loss of wages, and in loss of the right to bargain collectively, and is impairing their freedom of contract and depriving them of their property without due process of law, and that it is inequitable that the injunction or temporary restraining order remains in effect, and that the temporary restraining order should not have been granted, and that the temporary restraining order should not remain in force and effect.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for hearing before this Court in the United States Court House, in the United States Post Office Building, Charleston, South Carolina, ten days from the date hereof, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

MOTION TO DISMISS

The Defendant moves the Court as follows:

I To dismiss the Complaint of the South Carolina State Ports Authority on the grounds that the Complaint fails to state a claim against the Defendant or any of them upon which relief can be granted.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for hearing before this Court in the Court Room, United States Court House, in the United States Post Office Building, Charleston, S. C. on the 9th day of January, 1961, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

APPENDIX E

ARTICLE 1.

Creation and Organization.

§ 54-1. Creation and membership.

The South Carolina State Ports Authority is hereby created, consisting of and governed by a board of five members, which shall hereinafter, for the purpose of brevity and convenience, be referred to as the Authority.

1942 (42) 1535.

§ 54-2. Appointment and residence of members; vacancies.

The members of the board shall be appointed by the Governor, with the advice and consent of the Senate, for terms of seven years each and until their successors shall have been appointed. At least one member of the board shall be a qualified elector resident in *Beaufort* County, at least one shall be a qualified elector residing in *Charleston* County, at least one shall be a qualified elector residing in *Georgetown* County and at least one shall be a qualified elector who does not reside in any of said counties. In the event of a vacancy, however caused, a successor shall be appointed in the manner of original appointment for the unexpired term.

1942 (42) 1535.

§ 54-3. Organization and meetings.

They shall elect one of their number as chairman and one as vice-chairman and shall also elect a secretary. The board shall meet upon the call of its chairman and a majority of its members shall constitute a quorum for the transaction of its business.

1942 (42) 1535.

§ 54-4. Treasurer.

The Authority shall select one of its members to serve as its treasurer. The Authority shall require a surety bond of such appointee in such amount as the Authority may fix and the premium thereon shall be paid by the Authority as a necessary expense of the Authority.

1942 (42) 1535.

ARTICLE 2.

Purposes and Powers Generally.

§ 54-11. State may improve harbors through Authority.

Through the Authority the State may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors or seaports within the State, namely *Beaufort*, *Charleston* and *Georgetown*, and works of internal improvement incident thereto, including the acquisition or construction, maintenance and operation at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

1942 (42) 1535.

§ 54-12. Jurisdiction.

The jurisdiction of the Authority in any of said harbors or seaports within the State shall extend over the waters and shores of such harbors or seaports and over that part of all tributary streams flowing into such harbors or seaports in which the tide ebbs and flows and shall extend to the outer edge of the outer bar at such harbors or seaports.

1942 (42) 1535.

§ 54-13. Purposes of Authority.

The Authority is created as an instrumentality of the State for the accomplishment of the following general purposes, all or any of them, which are intended to broaden and not to restrict any other powers given to it in this chapter, namely.

(1) To develop and improve the harbors or seaports of *Beaufort*, *Charleston* and *Georgetown* for the handling of

water-borne commerce from and to any part of the State and other states and foreign countries;

(2) To acquire, construct, equip, maintain, develop and improve such harbors or seaports and their port facilities;

(3) To foster and stimulate the shipment of freight and commerce through said ports, whether originating within or without the State, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(4) To co-operate with the United States of America, and any agency or any department, corporation or instrumentality thereof in the maintenance, development, improvement and use of said harbors and seaports in connection with and in furtherance of the war operations and needs of the United States;

(5) To accept funds from any of the counties of *Beaufort*, *Charleston* or *Georgetown*, and to use them in such manner, within the purposes of the Authority, as shall be stipulated by the county and to act as agent or instrumentality for any of said counties in any matter coming within the general purposes of the Authority;

(6) To act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purpose or powers of the Authority; and in general

(7) To do and perform any act or function which may tend to or be useful toward the development and improvement of said harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through said harbors and seaports.

1942 (42) 1535.

§ 54-14. Powers.

In order to enable it to carry out the purposes of this chapter, the Authority:

(1) Shall have the powers of a body corporate, including the power to sue and be sued, to make contracts and to adopt and use a common seal and alter it as may be deemed expedient;

(2) May rent, lease, buy, own, acquire, mortgage and dispose of such property, real or personal, as the Authority may deem proper to carry out the purposes and provisions of this chapter, all or any of them;

(3) May acquire, construct, maintain, equip and operate wharves, docks, ships, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto and the construction of belt line roads and highways and bridges and causeways thereon and other bridges an dcauseways necessary or useful in connection therewith and shipyards, shipping facilities and transportation facilities incident thereto and useful or convenient for the use thereof, including terminal railroads;

(4) May acquire, construct, maintain, operate and contract to operate in any of said counties airports, seaplane bases, naval bases and any other facilities necessary or useful in carrying out the purposes of this chapter and of the Authority;

(5) Shall appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation thereof;

(6) Shall establish an office for the transaction of its busi-

ness in the city of *Charleston* and such other offices within and without the State as may be deemed by the board to be necessary or useful in carrying out the purposes of this chapter;

(7) May create and operate such agencies and departments as the board may deem necessary or useful for the furtherance of any of the purposes of this chapter;

(8) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Authority and incident to the administration and operation thereof and all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this chapter;

(9) May apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof;

(10) May act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(11) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may

be transacted and in which the powers granted to it may be enjoyed and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;

(12) May do any and all other acts and things in this chapter authorized or required to be done, whether or not included in the general powers in this section mentioned; and

(13) May do any and all things necessary to accomplish the purposes of this chapter.

But the Authority shall not engage in shipbuilding except upon the unanimous vote of its members.

1942 (42) 1535.

§ 54-15. Acquisition of property.

For the acquiring of rights of way and property necessary for the construction of terminal railroads and structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevators, compresses, refrigerator storage plants, warehouses and other riprarian and litoral terminal and structures and approaches thereto and transportation facilities needful for the convenient use thereof and belt line roads and highways, causeways and bridges and other bridges and causeways, the Authority may purchase the same by negotiation, or may condemn them and should it elect to exercise the right of eminent domain, condemnation proceedings shall be maintained by and in the name of the Authority and it may proceed in the manner provided by the laws of the State for procedure by any county, municipality or authority organized under the laws of this State, by the South Carolina State Highway Department, by railroad corporations or in any other manner provided by law, as the Authority may, in its discretion, elect. The power of eminent

domain shall apply not only as to all property of private persons or corporations but also as to property already devoted to public use.

1942 (42) 1535.

§ 54-16. Powers with respect to certain property.

The Authority may exercise in reference to any property, assets, holdings, leases, contracts, rights, franchises or licenses conveyed to it under section 1 of Act No. 216 of 1945 (Acts 1945, p. 365) all of the rights, privileges, powers, immunities, duties and functions conferred by §§ 59-561 to 59-565 and §§ 54-101, 54-106, 54-113 to 54-115 upon cities of this State having a population of fifty thousand inhabitants or more and upon port utilities commissions of such cities.

1945 (44) 365.

§ 54-17. Use of certain State property.

The Authority may take, exclusively occupy, use and possess, insofar as may be necessary for carrying out the provisions of this chapter, any areas of land owned by the State and within the counties of *Beaufort*, *Charleston* and *Georgetown*, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, the sea and arms thereof and other waters of the State and the riprarian rights thereto pertaining. When so taken and occupied, due notice of such taking and occupancy having been filed with the Secretary of State, such areas of land are hereby granted to and shall be the property of the Authority. For the purposes of this section, the meaning of the term "*use*" shall include the removal of material from and the placing of material on any such land. In case it shall be held by any court of competent jurisdiction that there are any lands owned by the State which may not be so granted, then the provisions of

this section shall continue in full force and effect as to all other lands owned by the State. The provisions of this section are subject to all laws and regulations of the United States with respect to navigable waters.

1942 (42) 1535.

§ 54-18. Exchange of property; removal of structures.

The Authority may exchange any property acquired under the authority of this chapter for other property usable in carrying out the powers hereby conferred and also may remove from lands needed for its purposes and reconstruction on other locations buildings, terminals, railroads or other structures upon the payment of just compensation, if, in its judgment, it is necessary or expedient so to do in order to carry out any of its plans for port development, under the authorization of this chapter.

1942 (42) 1535.

§ 54-19. Lease or grant of facilities, etc., to United States; reimbursing United States for certain acquisition costs.

The board of the Authority may assign, transfer, lease, convey, grant or donate to the United States of America, or to the appropriate agency or department thereof, any or all of the property of the Authority for any use by such grantee for any purpose included within the general purposes of this chapter, as stated in § 54-13, such assignment, transfer, lease, conveyance, grant or donation to be upon such terms as the board of the Authority may deem advisable. In the event the United States of America should decide to undertake the acquisition, construction, equipment, maintenance or operation of the airports, seaplane bases, naval bases, wharves, piers,

ships, refrigerator storage plants, warehouses, elevators, compresses, docks, shipyards, shipping and transportation facilities before referred to, including terminal railroads, roads, highways, causeways or bridges, and should itself decide to acquire the lands and properties necessarily needed in connection therewith by condemnation or otherwise, the board of the Authority may transfer and pay over to the United States of America, or to the appropriate agency or department thereof, such of the moneys belonging to the Authority as may be found needed or reasonably required by the United States of America to meet and pay the amount of judgments or condemnation, including costs, if any be taxed thereon, as may from time to time be rendered against the United States of America, or its appropriate agency, or as may be reasonably necessary to permit and allow the United States of America, or its appropriate agency, to acquire and become possessed of such lands and properties as are reasonably required for the construction and use of the facilities before referred to.

1942 (42) 1535.

§ 54-20. Acquisition and operation of terminal railroads.

The Authority may acquire, own, lease, locate, install, construct, equip, hold, maintain, control and operate at harbors and seaports a line of terminal railroads with necessary sidings, turnouts, spurs, branches, switches, yard tracks, bridges, trestles and causeways and in connection therewith or appurtenant thereto may further lease, install, construct, acquire, own, maintain, control and use any and every kind of character of motive power and conveyance or appliance necessary or proper to carry passengers, goods, wares and merchan-

dise over, along or upon the tracks of such railroads or other conveyances.

1942 (42), 1535.

§ 54-21. Same; contracts with employees.

The Authority may make agreements as to the scale of wages, seniority and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the operation of the terminal railroads provided for in § 54-20 and the service and equipment pertinent thereto. And should the Authority exercise the power herein given, then the Authority shall make such agreements with such employees in accordance with the Act of Congress known as the Railway Labor Act (U. S. C. title 45, sections 151-163) as amended or as hereafter amended to the end that such agreements as to seniority and working conditions will obtain as to such employees and the standard rate of pay be provided as is in force relative to like employees of interstate railroads operating in the same territory with the terminal railroads authorized hereby.

1942 (42) 1535.

§ 54-22. Same; connecting with or crossing other railroads.

The Authority may with its terminal railroads connect with or cross any other railroad upon the payment of just compensation and receive, deliver to and transport the freight, passengers and cars of common carrier railroads as though it were an ordinary common carrier.

1942 (42) 1535.

ARTICLE 3.

Supervision of Wharves, Warehouses, etc.

§ 54-31. General supervision.

The Authority shall have general supervision in the port of *Charleston* of all wharves, warehouses and terminal facilities of all transmitting and transporting corporations and of all wharves, warehouses and terminal facilities of persons engaged in business as public warehousemen or wharfingers and shall examine them and keep itself informed as to their condition and the manner in which they are operated, with reference to the security and accommodation of the public and the compliance with all provisions of law applicable thereto.

1942 Code § 6727; 1932 Code § 6727; Civ. C. '22 § 3628; 1912 (27) 661; 1923 (33) 63; 1945 (44) 365.

§ 54-32. Examination of wharves, etc.

The Authority may examine into all wharves, warehouses and terminal facilities, and the approaches thereto in *Charleston* County.

1942 Code § 6730; 1932 Code § 6730; Civ. C. '22 § 3631; 1912 (27) 661; 1923 (33) 63; 1945 (44) 365.

§ 54-33. Requiring repair or improvement of wharves, etc.

Whenever in the judgment of the Authority it shall appear that repairs are necessary upon any such wharves, warehouses or terminal facilities or that any additions, improvements or enlargements in such wharves, warehouses or terminal facilities or any change in the mode of operating and constructing such business is reasonable and expedient in order to promote the security, convenience and accommodation of the public or to provide facilities required by the business offering at

the port of *Charleston*, the Authority shall give information in writing to the owners or operators of such wharves, warehouses and terminal facilities of the improvements, changes, enlargements and betterments which it judges to be proper and if the owners or operators of such wharves, warehouses and terminal facilities shall fail within sixty days to adopt the suggestion of the Authority, the Authority shall take such legal proceedings as it may deem expedient.

1942 Code § 6728; 1932 Code § 6728; Civ. C. '22 § 3629; 1912 (27) 661; 1923 (33) 63; 1945 (44) 365.

§ 54-34. Authority may order improvements to wharves, etc., on petition.

Upon the written petition of the city council of *Charleston* or of any of the patrons of any person owning or operating a wharf, warehouse or terminal facility for public uses or for hire, alleging that the plant or equipment in *Charleston* County of such person is inadequate or unsuited to the public need, the Authority shall fix a time and place for a hearing upon such petition and shall mail notice thereof to the parties in interest and give due public notice thereof at least one week prior to such hearing. Upon such hearing the Authority may, if it finds the wharf, warehouse or terminal facility to be inadequate or unsuited to the public need, order and prescribe such wharf, warehouse or terminal facility as shall be adequate and suitable and fix a time within which such person owning or operating the same shall construct such additions or improvements. Such person shall thereupon construct such additions or improvements to its plant or equipment within the time so fixed.

1942 Code § 6729; 1932 Code § 6729; Civ. C. '22 § 3630; 1912 (27) 661; 1945 (44) 365.

§ 54-35. Repairs when wharves, etc., unsafe, etc.

The owners or occupiers of any wharf, warehouse or terminal facility within *Charleston* County shall at all times, as long as such property is used for public purposes, keep it and the sheds thereon and the approaches thereto in proper condition and repair. If such wharf, warehouse, terminal facility, superstructures or the approaches thereto are dangerous to life or limb or unsafe or unsuitable for the persons using them, the Authority shall notify in writing the owner or occupier of such wharf, warehouse or terminal facility to put it in proper repair or condition. If the owner or occupier shall neglect or refuse to put such wharf, warehouse, terminal facility, superstructures or approaches in proper condition within thirty days after notice, such owner or occupier so offending shall be subject to a penalty of one hundred dollars and the further sum of ten dollars for each day after such neglect shall continue and shall moreover pay all expense incurred by reason of such neglect or refusal. And if such wharf, warehouse or terminal facility be at such time used for public purposes, the Authority may repair and put it in safe and suitable condition at the expense of the owner or occupier. But the owner or occupier of any such property shall, within ten days after notice is served upon him to repair the same, have the right to apply to the Authority for a hearing.

1942 Code § 6731; 1932 Code § 6731; Civ. C. '22 § 3632; 1912 (27) 661; 1923 (33) 63; 1945 (44) 365.

§ 54-36. Penalties for violations of rules and regulations.

If any person having a wharf, warehouse or terminal facility used for public purposes in *Charleston* County shall be guilty of a violation of the rules and regulations provided and prescribed by the Authority, such person owning or op-

erating such wharf, warehouse or terminal facility shall incur a penalty for each offense of not less than one hundred dollars nor more than three hundred dollars, to be fixed by the presiding judge. An action for the recovery of such penalty shall be in any court of competent jurisdiction in the State where such violation has occurred or wrong has been perpetrated.

1942 Code § 6732; 1932 Code § 6732; Civ. C. '22 § 3633; 1912 (27) 661; 1945 (44) 365.

§ 54-37. Appeals.

Any such person may appeal from any order, ruling or requirement of the Authority under this article to the Court of Common Pleas for *Charleston* County, to be heard and determined by the presiding judge thereof as if tried de novo before him. The judge shall pass upon and determine the reasonableness of such order, ruling or requirement and such appeal shall stay the execution of any order, ruling or requirement appealed from. No fines or penalties imposed by the Authority shall be operative or commence to run until the final determination of such appeal.

1942 Code § 6733; 1932 Code § 6733; Civ. C. '22 § 3634; 1912 (27) 661; 1945 (44) 365.

§ 54-38. Application of article.

The provisions of this article shall not apply to any portion of *Charleston* County not included in the city of *Charleston* or in the portion of the county lying to the north of said city and between the Ashley and Cooper Rivers.

1942 Code § 6733; 1932 Code § 6733; Civ. C. '22 § 3634; 1912 (27) 661; 1945 (44) 365.

ARTICLE 4.

Erection of Wharves, Docks, etc., and Repair of Docks.

§ 54-51. Powers as to erection or removal of wharves, docks, etc.

The Authority may fix the lines along the bay and harbor of *Charleston* and the rivers and creeks flowing therein within which riprarian owners may erect wharves, docks and other proper erections and fixtures for commercial, manufacturing or any other purposes. The Authority may cause the removal of any wharf, dock, wreck or other structure that may obstruct navigation or that may, in its opinion, be injurious to said bay, harbor, rivers or creeks, at the expense of the owner or the person causing the obstructions. But the rights of any owner of a wharf whose lines have heretofore been fixed by grant or by authority of State legislation are in no wise to be disturbed.

1942 Code § 6719; 1932 Code § 6719; Civ. C. '22 § 3617; Civ. C. '12 § 2507; Civ. C. '02 § 1651; 1945 (44) 365.

§ 54-52. Permit for construction of wharf, etc.

No person shall build or extend any wharf or other obstruction in or upon the waters of the bay or harbor of *Charleston* or the rivers or creeks flowing therein without first obtaining, in writing, from the Authority a permit for so doing, except when the lines of such wharf have been fixed by any grant or by authority of State legislation, under a penalty of twenty dollars for every day such wharf or obstruction shall remain.

1942 Code § 6720; 1932 Code § 6720; Civ. C. '22 § 3618; Civ. C. '12 § 2508; Civ. C. '02 § 1652; 1945 (44) 365.

§ 54-53. Penalty for building wharves or other obstructions beyond limits without authority.

No person shall build any wharf or other obstruction beyond

the lines so fixed by the Authority except when the lines of such wharf have heretofore been fixed by grant or by authority of State legislation. Any person so doing shall pay the sum of twenty dollars for every such offense and shall moreover be fined in the sum of twenty dollars for every day such wharf or other obstruction shall remain.

1942 Code § 6720; 1932 Code § 6720; Civ. C. '22 § 3618; Civ. C. '12 § 2508; Civ. C. '02 § 1652; 1945 (44) 365.

§ 54-54. Duties of Authority as to repair of docks; owners liable for neglect.

The Authority shall examine, or cause to be examined, all the docks, public or private, upon the waters of *Charleston* bay and harbor and the rivers and creeks flowing therein. When it is the opinion of the Authority that any such dock is not in a proper condition for the purposes for which it was designed and used, it shall cause a notice to be served upon the owner or occupier of such dock and he shall deepen such dock and if such owner or occupier shall neglect or refuse to attend to such dock after thirty days' notice, such person so offending shall forfeit and pay twenty dollars and the further sum of five dollars for every day he shall so neglect or refuse and shall, moreover, pay all expenses incurred by reason of such neglect or refusal.

1942 Code § 6721; 1932 Code § 6721; Civ. C. '22 § 3619; Civ. C. '12 § 2509; Civ. C. '02 § 1653; 1945 (44) 365.

§ 54-55. Authority to prosecute for fines.

The Authority shall prosecute for fines and penalties under §§ 54-51 to 54-54.

1942 Code § 6720; 1932 Code § 6720; Civ. C. '22 § 3618; Civ. C. '12 § 2508; Civ. C. '02 § 1652; 1945 (44) 365.

ARTICLE 5.

Financial Matters.

§ 54-61. Issue of bonds.

As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building structure, terminal railroad or any other matter or thing which the Authority is herein authorized to acquire, construct, equip, maintain or operate, all or any of them, the Authority may issue bonds, payable both as to principal and interest from the revenues to be derived from the operation of all or any part of its properties and facilities, and the powers and authority granted to counties, cities, school districts and other political subdivisions of the State are hereby extended to and made available to the Authority. All revenue bonds issued by the Authority to obtain funds for the acquisition, construction, equipment, maintenance and operation of its properties and facilities shall be issued in accordance with the provisions of §§ 59-361 to 59-415 and all conditions, restrictions and limitations imposed by said §§ 59-361 to 59-415 as amended, shall be observed by the Authority in the issuance of such bonds, except as follows:

(1) A pledge of the net revenues derived from the operation of its properties and facilities, all or any of them, rather than its gross revenues, may be made; and

(2) Free service may, in the discretion of the Authority, be afforded to the United States of America or any agency, department, corporation or instrumentality thereof by any property or facility of the Authority to acquire, construct, equip, maintain and operate which funds were obtained from the revenue bonds purchased and held by a federal agency, provided such free service is with the consent and at the re-

quest of the federal agency then holding the whole of such revenue bonds.

1942 (42) 1535.

§ 54-62. Funds; disbursement thereof; surplus.

All funds of the Authority shall be deposited in a bank or banks to be designated by the Authority. Funds of the Authority shall be paid out only upon warrants signed by the treasurer of the Authority and countersigned by the chairman or the acting chairman. No warrants shall be drawn or issued disbursing any of the funds of the Authority except for a purpose authorized by this chapter and only when the account or expenditure for which they are to be given in payment has been audited and approved by the Authority. Any and all net revenues or earnings not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly.

1942 (42) 1535.

§ 54-63. Annual financial statement.

At least once in each year the Authority shall publish once in some newspaper published in *Charleston* County a complete detailed statement of all moneys received and disbursed by the Authority during the preceding year. Such statement shall also show the several sources from which such funds were received and the balance on hand at the time of publishing the statement and shall show the complete financial condition of the Authority.

1942 (42) 1535.

§ 54-64. Property of Authority exempt from taxation.

The property of the Authority shall not be subject to any taxes or assessments thereon.

1942 (42) 1535.

Title 54.

Ports and Maritime Matters.

Chap. 1. South Carolina State Ports Authority, §§ 54-54-62.2.

2. Port and Terminal Utilities and Commissions in Cer Cities, §§ 54-121 to 54-171.

AMENDMENTS

CHAPTER 1.

South Carolina State Ports Authority.

Article 1.

Creation and Organization.

Sec.

54-1. Creation and membership.
54-2. Appointment; term; vacancy.

Article 2.

Purposes and Powers Generally.

54-11. State may improve harbors through Authority.
Sec.
54-13. Purposes of Authority.
54-14. Powers.
54-15. Acquisition of property.

Article 5.

Financial Matters.

54-62.1. [Repealed.]
54-62.2. The State Port Construction Fund; use.

AMENDMENTS

ARTICLE 1.

Creation and Organization.

§ 54-1. Creation and membership.

The South Carolina State Ports Authority is herby created, consisting of and governed by a board of seven members, which shall hereinafter, for the purpose of brevity and convenience, be referred to as the *Authority*.

1942 (42) 1535; 1957 (50) 30.

§ 54-2. Appointment; term; vacancy.

The members of the board shall be appointed by the Governor, with the advice and consent of the Senate, for terms of seven years each and until their successors shall have been apppointed and have qualified, with one member being appointed for term of three years, one for four years, one for five years, one for six years and one for seven years, each from February 13 1957, and during 1957 one for one year and one for two years. In the event of a vacancy, however caused, a successor shall be appointed in the manner of original appointment for the unexpired term.

1942 (42) 1535; 1957 (50) 30.

Effect of amendment.—The 1957 amendment increased the term until the qualification of successor and eliminated requirement of appointment of members from Beaufort, Charleston and Georgetown Counties.

ARTICLE 2.

Purposes and Powers Generally.

§ 54-11. State may improve harbors through Authority.

Through the Authority the State may engage in promoting,

developing, constructing, equipping, maintaining and operating the harbors or seaports within the State, namely *Charleston, Georgetown* and *Port Royal*, and works of internal improvement incident thereto, including the acquisition or construction, maintenance and poeration at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

1942 (42) 1535; 1956 (49) 1794.

§ 54-13. Purposes of Authority.

The Authority is created as an instrumentality of the State for the accomplishment of the following general purposes, all or any of them, which are intended to broaden and not to restrict any other powers given to it in this chapter, namely:

(1) To develop and improve the harbors or seaports of *Charleston, Georgetown* and *Port Royal* for the handling of water-borne commerce from and to any part of the State and other states and foreign countries;

(2) To acquire, construct, equip, maintain, develop and improve such harbors or seaports and their port facilities;

(3) To foster and stimulate the shipment of freight and commerce through such ports, whether originating within or without the State, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(4) To cooperate with the United States of America, and any agency or any department, corporation or instrumentarily thereof in the maintenance, development, improvement and use of such harbors and seaports in connection with and in

furtherance of the war operations and needs of the United States;

(5) To accept funds from any of the counties of *Beaufort, Charleston* or *Georgetown*, and to use them in such manner, within the purposes of the Authority as shall be stipulated by the county and to act as agent or instrumentality for any of such counties in any matter coming within the general purposes of the Authority;

(6) To act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(7) To cooperate and act as co-assurer with the city of *Augusta*, Georgia, and the Georgia State Ports Authority in furtherance of the river development project known as the Savannah River project below *Augusta;*

(8) To promote, develop, construct, equip, maintain and operate a harbor or harbors within this State on the Savannah River, and in furtherance thereof have all of the powers, purposes and authority given by law to the Authority in reference to the harbors and seaports of *Charleston, Georgetown* and *Port Royal;* and in general.

(9) To do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports.

1942 (42) 1535; 1956 (49) 1794; 1958 (50) 1881.

§ 54-14. Powers.

• • •

(14) May promulgate rules and regulations governing the use of or doing business on the Authority's property or facilities, including the adoption of safety standards and insurance coverage or proof of financial responsibility, and may provide for the licensing of persons using or doing business on such property or facilities, and for license fees to cover the expense thereof. Licenses may be revoked after notice and hearing by the Authority for wilful breach of or failure to comply with such rules and regulations.

1942 (42) 1535; 1957 (50) 30.

Cross reference.—As to Authority's duties and powers in harbor and port of Charleston, see §§ 54-123 et seq.

Effect of amendment—The 1957 amendment added item (14).

§ 54-15. Acquisition of property.

For the acquiring of rights of way and property necessary for the construction of terminal railroads and structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevator, compresses, refrigerator storage plants, warehouses and other riparian and littoral terminals and structures and approaches thereto and transportation facilities needful for the convenient use thereof and belt line roads and highways, causeways and bridges and other bridges and causeways, and for the acquiring of property necessary for the river development project known as the Savannah River project below *Augusta*, and for the acquiring of property necessary for the development of a harbor or harbors within this State on the Savannah River, all or any of such purposes, the Authority may purchase the same by negotiation, or may condemn them and should it elect to exercise the right of eminent domain, condemnation proceed-

ings shall be maintained by and in the name of the Authority and it may proceed in the manner provided by the laws of the State for procedure by any county, municipality or authority organized under the laws of this State, by the State Highway Department, by railroad corporations or in any other manner provided by law, as the Authority may, in its discretion, elect. The power of eminent domain shall apply not only as to all property of private persons or corporations but also as to property already devoted to public use.

1942 (42) 1535; 1958 (50) 1881.

ARTICLE 5.

Financial Matters.

§ 54-62.1. The State Port Construction Fund; use.

Repealed by A. & J. R. 1958 (50) 1899.

Cross reference.—See now § 54-62.2.

§ 54-62.2. The State Port Construction Fund; use.

The Authority may accept contributions from all persons for the construction and equipping of port facilities and improvements in State ports and shall place all such contributions in a separate fund to be known as The State Port Construction Fund. It shall use such fund for the purpose of engineering, constructing and equipping new port facilities and improving and enlarging existing port facilities.

1958 (50) 1899.

CHAPTER 2.

Port and Terminal Utilities and Commissions in Certain Cities.

Article 2.

Authority's Duties and Powers Over Harbor and Bay of Charleston and Waters Flowing Therein.

Sec.

54-121. [Repealed.]
54-122. [Repealed.]
54-123. Jurisdiction and powers of State Ports Authority; enforcement of rules, etc.
54-124. Deposit of excavated material.

Sec.

54-125. Harbor master and port wardens.
54-126. Fees and port charges.
54-127. Payment and disposition of fees, harbor or port charges, fines and penalties.
54-128. Authority to report annually to General Assembly.

Article 4.

Port Royal Port Authority.

54-171. [Repealed.]

ARTICLE 2.

Authority's Duties and Powers Over Harbor and Bay of Charleston and Waters Flowing Therein.

§ 54-121. Constitution of commission.

Repealed by A. & J. R. 1957 (50) 32.

§ 54-122. Meetings.

Repealed by A. & J. R. 1957 (50) 32.

§ 54-123. Jurisdiction and powers of State Ports Authority; enforcement of rules, etc.

The South Carolina State Ports Authority shall have jurisdiction over the harbor and bay of *Charleston* and the rivers and creeks flowing therein, may preserve peace and good order in said bay and harbor and shall make such regulations as it may see fit, not repugnant to the laws of the land, for the regulation and government of vessels entering said port and waters so as to provide for their safe and convenient use thereof and for the protection and preservation of said bay, harbor, rivers and creeks from injury by means of deposit of ballast and other materials, the creation of obstructions or for any other cause whatsoever, with authority to prescribe such penalties for the violation of such regulations as it may deem adequate; *provided,* that such penalty shall not exceed the sum of five hundred dollars for each offense, together with the expense of removing such obstructions or interferences with navigation. The solicitor of the circuit shall enforce such penalties upon the information an dat the request of the Authority.

1942 Code § 6717; 1932 Code § 6717; Civ. C. '22 § 3615; Civ. '12 § 2[illegible]; Civ. C. '02 § 1649; 1881 (17) 604; 1885 (19) 354; 1957 (50) 32.

§ 54-124. Deposit of excavated material.

When any dredging or excavation shall be done in said bay and harbor or rivers and creeks or the docks thereon, the material excavated shall be deposited only at such place or places as may be designated by the Authority, under such penalty not exceeding the amount prescribed in § 54-123, as the Au-

thority shall prescribe. The Authority shall prosecute for fines and penalties under this section.

1942 Code §§ 6720, 6722; 1932 Code §§ 6720, 6722; Civ. C. '22 §§ 3618, 3620; Civ. C. '12 §§ 2508, 2510; Civ. C. '02 §§ 1652, 1654; 1945 (44) 365; 1957 (50) 32.

§ 54-125. Harbor master and port wardens.

The Authority may elect or appoint annually a harbor master and such number of port wardens as in its discretion is necessary for the bay and harbor of *Charleston* and the rivers and creeks flowing therein and may define and assign the duties of such harbor master and port wardens under the rules and regulations for the government of vessels within or entering into said harbor and waters, or any of them, and for their safe and convenient use of said waters and may regulate their compensation, with power to remove them, or any of them, at its discretion.

1942 Code § 6723; 1932 Code § 6723; Civ. C. '22 § 3621; Civ. C. '12 § 2511; Civ. C. '02 § 1655; 1957 (50) 32.

§ 54-126. Fees and port charges.

The Authority may levy and collect from all vessels entering into and using the port of *Charleston* such fees and harbor or port charges, not inconsistent with the law, as, in its discretion, may be necessary to pay the harbor master and port wardens for the services required of them and to defray the necessary expenses attendant upon the execution of the duties devolved upon it under this article in relation to the regulations for the safety and convenience of vessels entering said port and waters, or any of them.

1942 Code § 6724; 1932 Code § 6724; Civ. C. '22 § 3622; Civ. C. '12 § 2512; Civ. C. '02 § 1656; 1885 (19) 354; 1957 (50) 32.

§ 54-127. Payment and disposition of fees, harbor or port charges, fines and penalties.

All fees, harbor or port charges, fines and penalties collected under the provisions of this article shall be paid over to the Authority and be disbursed by it in paying the salaries of the harbor master and port warden and such other officers as it may see fit to appoint to facilitate the discharge of the duties imposed by this article and such other expenses as may be incident to such duties. At the end of each fiscal year it shall keep on hand the sum of five thousand dollars as an operating fund and shall turn over all funds in excess of five thousand dollars to the State Port Construction Fund.

1942 Code § 6725; 1932 Code § 6725; Civ. C. '22 § 3623; Civ. C. '12 § 2513; Civ. C. '02 § 1657; 1881 (17) 606; 1956 (49) 1813; 1957 (50) 32.

Cross reference.—See § 54-62.2 for State Port Construction Fund.

§ 54-128. Authority to report annually to General Assembly.

The Authority shall annually report to the General Assembly the amounts received for fees, harbor or port charges, fines and penalties and the disbursement thereof and also generally its acts and doings under this article.

1942 Code § 6726; 1932 Code § 6726; Civ. C. '22 § 3624; Civ. C. '12 § 2514; Civ. C. '02 § 1658; 1881 (17) 606; 1957 (50) 32.

ARTICLE 4.

Port Royal Port Authority.

§ 54-171. Created, etc.

Repealed by A. & J. R. 1960 (51) 1993.

Cross reference.—See now § 14-400.41.

LE COPY

Office-Supreme Court, U.S.
FILED
MAY 17 1961
JAMES R. BROWNING, Clerk

No. 922

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1960

LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, A.F.L.-C.I.O., its officers, members and employees, and GEORGE GERMAN, individually and as President of LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, A.F.L.-C.I.O., BRUCE BENNETT, LOUIS JOHNSON, WILLIE DAVIS, L. BAXLEY and ZACHARIAS FAILEY,

APPELLANTS

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, a body corporate and politic

APPELLEE

APPEAL FROM THE SPECIALLY DESIGNATED THREE-JUDGE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS

FIGG, GIBBS & GRIMBALL
COMING B. GIBBS
WILLIAM H. GRIMBALL, JR.
Charleston, South Carolina
Attorneys for Appellee

WALKER, EVANS & COGSWELL CO.—Printers of Distinction Since 1821—CHARLESTON, S. C.

INDEX

	Page
Opinions Below	1
Statutes Involved	2
Statement of the Case	2
Motion to Dismiss	3
Argument	4
I. The Order Appealed from is not Reviewable by Appeal or Otherwise because of Section 1447 (d) of 28 U. S. C.	2, 4
II. The Order Appealed from is not Appealable under Section 1253 of 28 U. S. C.	2, 5
Conclusion	7

TABLE OF CITATIONS

	Page
Aetna Casualty & Surety Co. v. Flowers, 330 U. S. 464	5
Florida Lime and Avocado Growers v. Jacobsen, 362 U. S. 73	6
Kloeb v. Armour & Co., 311 U. S. 199	5
Metropolitan Casualty Ins. Co. v. Stevens, 312 U. S. 563	5
United States v. Rice, 327 U. S. 742	5
STATUTES:	
28 U. S. C. 1253	2, 5
28 U. S. C. 1447 (d)	2, 4

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1960

LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, A.F.L.-C.I.O., its officers, members and employees, and GEORGE GERMAN, individually and as President of LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, A.F.L.-C.I.O., BRUCE BENNETT, LOUIS JOHNSON, WILLIE DAVIS, L. BAXLEY and ZACHARIAS FAILEY,

APPELLANTS

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, a body corporate and politic

APPELLEE

APPEAL FROM THE SPECIALLY DESIGNATED THREE-JUDGE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS

OPINIONS BELOW

The order and opinion below are incorporated in the Appellants' Jurisdictional Statement, Appendix A, pp. 1a-3a. The opinion below is reported as *South Carolina State Ports Authority v. Local 1422 of The International Longshoremen's Union, AFL-CIO, et al.*, 191 F. Supp. 156.

STATUTES INVOLVED

The statutes involved are:

(1) 28 U.S.C. 1447 (d);

(2) 28 U.S.C. 1253.

Section 1447 (d) of 28 U. S. C. is as follows:

"(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

Section 1253 of 28 U. S. C. is as follows:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

STATEMENT OF THE CASE

This is an appeal from an order of a District Court of three judges remanding this case to the State court from which it was removed by appellants.

Appellee, the South Carolina State Ports Authority, created by statute as an instrumentality of the State of South Carolina, maintains and operates state-owned docks, warehouses and terminal facilities at Charleston, South Carolina. On December 8, 1960, appellants picketed certain of appellee's facilities at Charleston causing disruption of its operations. On the same day, appellee brought this action in the State court alleging a common law conspiracy by appellants resulting in illegal and damaging interference with appellee's operations, and sought and obtained a temporary restraining order from the State court which halted the picketing.

Thereafter, appellants removed the case to the United States District Court on the ground that the appellee's action is one arising under the laws of the United States. Following the removal of the case, appellants filed an amended answer and counterclaim alleging, among other things, that the statute creating the appellee is unconstitutional, and that the State court injunction should be vacated by a three-judge District Court because appellee's remedy was exclusively before the National Labor Relations Board.

Appellee thereafter moved to remand the case from the United States District Court to the State court on the ground that its action is brought under the common law of the State of South Carolina and does not arise under the constitution or laws of the United States.

Since appellants had asked in their counterclaim in the United States District Court for an injunction against enforcement of the State statute under which appellee operates, a special three-judge court was convened under 28 U. S. C., 2281 et seq. The three-judge court so convened heard and passed upon only the appellee's motion to remand the case to the State court, and did not reach or pass upon the other matters set forth in the appellants' answer and counterclaim and motions, and its order and opinion are only to the effect that the case was improvidently removed from the State court, and it only ordered that the case be remanded to the State court.

MOTION TO DISMISS

Appellee moves this Honorable Court to dismiss the appeal upon the following grounds:

(a) The order appealed from is an order remanding the case to the State court from which it was removed and is not reviewable on appeal or otherwise because

of the provisions of Section 1447 (d) of 28 U. S. C., and

(b) The order appealed from is not appealable to this court under Section 1253 of 28 U. S. C. because it is not an order granting or denying an interlocutory or permanent injunction.

ARGUMENT

I

The order appealed from is not reviewable by appeal or otherwise because of Section 1447 (d) of 28 U. S. C.

Section 1447 (d) of 28 U. S. C. provides:

"(d) On order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

The order and opinion below (Appellants' Jurisdictional Statement, Appendix A, pp. 1a–3a) from which appellants have appealed operates only to remand the case back to the State court from which appellants removed it. The three-judge District Court, which was convened at the instance of appellants, heard only appellee's motion to remand the case to the State court, and said court considered only the motion to remand, and did not reach and consider the other claims and questions set forth by appellants in their answer and counterclaim and motions. The District Court properly considered only whether or not appellee's complaint stated a cause of action arising under the laws of the United States, and finding that it did not, concluded that the District Court was without jurisdiction of the case and ordered it remanded to the State court.

This court has often held that a District Court order remanding a case to the State Court from which it was removed is not appealable.

Kloeb v. *Armour & Co.*, 311 U. S. 199, 61 S. Ct. 213, 85 L. Ed. 124 (1940);

Metropolitan Casualty Ins. Co. v. *Stevens*, 312 U. S. 563, 61 S. Ct. 715, 85 L. Ed. 1044 (1941);

United States v. *Rice*, 327 U. S. 742, 66 S. Ct. 853, 90 L. Ed. 982 (1946);

Aetna Casualty & Surety Co. v. *Flowers*, 330 U. S. 464, 67 S. Ct. 798, 91 L. Ed. 1024 (1947).

In Aetna Casualty & Surety Co. v. *Flowers*, 330 U. S. 464, 466, 67 S. Ct. 798, 799, this court said:

> "An order of a District Court remanding a cause to the State court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here." (Citing authorities)

Appellants contend that the effect of the District Court order remanding the case to the State court is to deny their application for an injunction against the State statute under which appellee operates, and to deny their motion to dismiss appellee's complaint. The answer to this is that the order of remand merely denied that the United States District Court had jurisdiction of the case and sent it back to the State court unaffected, for further proceedings there. Appellants still retain all of the defenses that they have advanced in their answer and counterclaim and motions, and the right to pursue the same in the State courts.

II

The order appealed from is not appealable under Section 1253 of 28 U. S. C.

Section 1253 of 28 U. S. C. provides:

> "Except as otherwise provided by law, any party may

appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges."

It is respectfully submitted that the order of remand appealed from here is not "an order granting or denying an interlocutory or permanent injunction" and that hence the order is not appealable to this court. As stated above, the order appealed from is simply an order remanding the case to the State court on the ground that it had been improvidently removed to the United States District Court and that the latter Court had no jurisdiction of the case. The District Court did not reach for consideration appellant's application for an injunction against the State statute under which appellee operates and certainly its order remanding the case to the State court did not *deny* the injunction sought.

Appellants cite *Florida Lime and Avocado Growers v. Jacobsen*, 362 U. S. 73, 80 S. Ct. 568, 4 L. Ed. 2d 568, to support their contention that this court has jurisdiction of their appeal in this case. However, it is respectfully submitted that the cited case is entirely distinguishable and different from the present case. In *Florida Lime and Avocado Growers v. Jacobsen, supra*, the complaint sought to enjoin the enforcement of the State statute alleged to be unconstitutional. The three-judge District Court that heard the case considered the constitutionality of the statute and dismissed the action. This Court allowed the direct appeal that was made from the dismissal of the action by the three-judge District Court. Since the three-judge District Court dismissed the action, it necessarily had to deny the injunction that was sought and hence the right of direct appeal under 28 U. S. C., Section 1253 lies. But in the present case, there was not a dismissal of the action

(or denial of appellants' application for injunction), but simply a remand of the case to the State court, which preserves all of the rights and claims of the parties, and which only changed the forum of the action back to the State court where it was originally commenced.

CONCLUSION

For the reasons herein assigned, it is urged that the appeal be dismissed.

Respectfully submitted,

FIGG, GIBBS & GRIMBALL
COMING B. GIBBS
WILLIAM H. GRIMBALL, JR.
Charleston, South Carolina
Attorneys for Appellee